UNIVERSITY OF PENNSYLVANIA

THE WHARTON SCHOOL

LGST 101

Professor Powell Fall 1996

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The University of Pennsylvania

The Wharton School

Legal Studies 101

Professor Frona M. Powell
Fall 1996

Assigned materials: Business Law and the Regulatory Environment, Metzger, Mallor, et al, (9th ed.)

Readings: Handout Booklet containing course materials

Professor's Office and Hours: To Be Announced

Course policies:

Exams: There will be three exams in the course. Exams will generally consist of both objective and essay or short-answer questions. The first two exams will be given in class and the third during final exam week. Each exam is worth 100 points. Failure to take an exam will result in a score of 0 for that exam.

Quizzes and extra-credit points: There may be several extra credit quizzes or in class graded assignments during the semester. Each will be worth approximately 3 points. These points will be added to your final point score on the three exams. In addition, you may earn extra credit points based on class participation.

Makeups: If you have a compelling reason (death in the immediate family or serious illness) for missing an hourly exam, you may obtain permission to take a makeup. To qualify for a makeup exam, you must obtain permission before you miss the regularly scheduled exam. There will be no make up of extra credit quizzes or in class assignments.

Grading: Your semester grade will be based upon the total points you accumulate on the three exams plus any extra-credit points.

Incompletes; Withdrawals: The instructor will follow University procedures and guidelines for granting incompletes and withdrawals.

Statement of Course Objectives

This course is designed to meet the following course objectives:

To help you learn to "think legally"
--become aware of legal implications of events and decisions
--become aware of the institutional framework in which law is created, changed, and applied
--become aware of major schemata of the law
--become aware of the factors that influence legal outcomes
--become aware of the public policy implications of legal questions
--reason independently the outcome of legal problems;
--to work with others to develop a legal argument addressing a specific legal issue in a hypothetical case

To familiarize you with the legal process by which legal disputes are resolved;

To increase your awareness of current areas of heightened legal responsibility for businesses, including criminal law affecting business, tort law; contract law; product liability law; and environmental law and regulations.

To help you reason about ethical issues that arise in business;

To help you explore the implications of legal doctrines for your future professional life.

Fall semester, 1996
Legal Studies 101
Professor Frona Powell

Course Syllabus (Fall Semester 1996)

(**Note:** Assignments in *Italics* are Readings in the Handout Booklet)

Wednesday 9/4: Introduction to Course: *Class Problem Handout--"Speluncean Explorers"*

Monday 9/9: Legal Reasoning: Chapter 1 text; *How to Read an Appellate Opinion--Peterson v. Romero, Class Problem "McBoyle v. U.S."*

Wednesday 9/11: Resolution of Private Disputes: Chapter 2 text; *"Long Arm Statute" Problem; Example of a Long Arm Statute; Class Problem "Dispute Settlement"*

Monday 9/16: Constitutional Issues: Chapter 3 text; *Questions for discussion, Lucas v. So. Car. Coastal Comm'n; Nollan v. Calif. Coastal Comm'n; "Takings" problem*

Wednesday 9/18: Criminal Law: Chapter 5, text; *Johnson & Towers, Inc.; Class Problem State v. Film Recovery*

Monday 9/23: Continue Criminal Law: *Kolender v. Lawson; California v. Superior Court; Class Problem: Helton v. Indiana.*

Wednesday 9/25: Intentional Torts: Chapter 6; *Crase v. Highland Village Value Plus Pharmacy; Class Problem #4 (Battery)*

Monday 9/30: Intentional Torts (Defamation/ Right of Privacy): *Hustler Magazine v. Falwell, Class Problem "Defamation"*

Wednesday 10/2: Negligence: Chapter 7: *Jersey City Redevelopment Authority; Problems in Negligence*

Monday 10/7: Negligence (continued): *Strict Liability (Jersey City Redevelopment Authority, (con't)); Class problem: Negligent Hiring*

Wednesday 10/9: **FIRST EXAM**

Monday 10/14: **NO CLASS**

Wednesday 10/16: Introduction to Contracts: Read Chapter 9;

Monday 10/21: Contract Offers: Read Chapter 10; *Class Problem: Allied v. Bob's Home Service*

Wednesday 10/23: Acceptance: Read Chapter 11; *Class Problem:*

Holland v. Belgar

Monday 10/28: Sales Contracts: Chapter 19; *Class Problem: Formation of Contracts under the UCC (Kahr v. Markland)*

Wednesday 10/30: Consideration: Chapter 12; *Class Problem: Lack of Mutuality of Promise (Sanders v. Arkansas Missouri Power)*

Monday 11/4: Reality of Consent and Capacity to Contract: Chapter 13 and Chapter 14;

Wednesday 11/6: Illegality: Chapter 15; Class Problem: *Enforcement of Exculpatory Clauses (Hall v. Garden Services)*

Monday 11/11: **SECOND EXAM**

Wednesday 11/13: Writing: Chapter 16

Monday 11/18: Performance and Remedies: Chapter 18; *Class Problem Pei v. Belushi*

Wednesday 11/20: Performance of Sales Contracts: Chapter 21; *Class Problem "A-1 Skates"*

Monday 11/25: Product Liability: Chapter 20

Wednesday 11/27: **NO CLASS--HAPPY THANKSGIVING**

Monday 12/2: Product Liability (Con't); *Strict Liability for a Defective Product (Hagans v. Oliver);* Introduction to Administrative Law: Read Chapter 46;

Wednesday 12/4: Begin Environmental Law: *Sierra Club v. Morton*

Monday 12/9: Environmental Law: *National Environmental Policy Act and the Endangered Species Act; Sweethome v. Babbitt*

FINAL EXAM: Date and Time to be Announced

Class Exercise[1] Name:_____

Five members of the Gigantic State University Spelunking Society went on a caving expedition in a limestone cavern. While they were deep in the cave a landslide occurred, completely blocking the entrance. A rescue effort was immediately begun. However, this effort was delayed by another landslide that resulted in the deaths of ten of the rescue workers. Throughout this ordeal, the five cavers, who had brought a two-way radio with them, were in constant radio contact with the rescue team. The cavers' food and water soon ran out. After twenty days, the cavers were informed that they would starve to death before the rescuers could reach them. Whetmore, one of the cavers, asked the rescue team if they would be able to survive if they consumed the flesh of one of their fellow cavers. A medical doctor on the rescue team reluctantly answered this question in the affirmative, but no one on the rescue team would recommend that such a plan be carried out.

There was no further radio contact until thirteen days later when the rescue team finally broke through to find only four of the cavers still alive. Whetmore, it was learned, had been killed and eaten by his companions three days after the last radio conversation. From the testimony of the four survivors it was learned that Whetmore recommended that they use a pair of dice to determine which of the party should be killed for the benefit of the others. Although the other members of the party were at first reluctant to carry out such a plan, Whetmore ultimately convinced them of its necessity. Before the dice were cast, however, Whetmore changed his mind and refused to participate. The others charged him with breach of the agreement, and when it came time for him to cast the dice, they were thrown by one of the survivors. Whetmore allegedly stated that he had no objections to the fairness of the throw, although he still protested the very idea of the process. When his throw was the low one of the five, he was immediately put to death and eaten by his companions.

After recuperating from their ordeal, all of the surviving cavers were charged with murder for violating the Gigantic state statute that declared:

> **"WHOEVER SHALL WILLFULLY TAKE THE LIFE OF ANOTHER SHALL BE PUNISHED BY DEATH."**

This statute, on its face, permitted no exceptions and gave the trial judge no discretion with respect to the penalty to be imposed.

The four surviving cavers were tried and the jury found them guilty of the crime charged. The trial judge sentenced the defendants to death.

You are a judge on the court of appeals, and this case has come to you on appeal. You must decide whether the defendants' conviction should stand or whether it should be reversed. If the conviction stands, the defendants will be executed. If it is reversed, the defendants will be set free.

CHECK THE APPROPRIATE RESULT

_____ Affirm the conviction _____ Reverse the conviction

Briefly Explain Your Reasoning and Put on Reverse Side:

[1]This exercise is modeled on The Case of the Speluncean Explorers, written by Lon L. Fuller and published in volume 62 Harvard Law Review at 616 (1949).

HOW TO READ AN APPELLATE OPINION

A number of appellate court opinions will be assigned to you during this course to illustrate various principles of law and to increase your understanding of how the legal system works. Most students find these cases difficult to understand at first because their structure is unfamiliar and they usually contain new vocabulary. This reading is intended to familiarize you with some of the conventions of appellate court opinions. It will help if you get in the habit of looking up unfamiliar words and phases in the glossary in the back of your textbook or in a dictionary.

Turn to the case of Peterson v. Romero (in your reading book in the "Statutory Interpretation" reading). (The "v." is an abbreviation for "versus," meaning "against.") The first thing you see is the bold-face title of the case, Peterson v. Romero. This tells you who the parties to the lawsuit were. The plaintiff is the person who brings the lawsuit, and the defendant is the person being sued. However, you cannot assume that the first name is that of the plaintiff--you must read the facts of the case to figure out who was the plaintiff because the names switch every time the case is appealed.

The series of numbers and letters beneath the title of the case is the "citation" or "cite" of the case. They tell you where you could look up the entire opinion in the case. (The cases in your textbook have been edited so that you read only the information necessary to the point being studied.) This citation also tells you which court decided the case and when it did so. This can be important in understanding why the case turned out as it did, or what its significance is (for instance, some courts are known to be liberal or conservative on certain issues, and an opinion by the United State Supreme Court binds all other courts in the country, while one by a state supreme court binds only courts in that state.) The citation to Peterson v. Romero tells us that you could find the case in volume 542 of the Pacific Reporter on page 434, and that the case was decided in 1975 by the New Mexico Court of Appeals. Some cases also have parallel citations to another reporter system, such as a state reporter.

Keep in mind that all of the cases you will be reading will have been decided by an appellate court (court of appeal). Appellate courts get their cases when one of the parties to a lawsuit loses at the trial level and asks the appellate court to reverse the trial court's decision. The function of an appellate court is to correct errors of law that were made by the trial judge. The cases that you read, therefore, will concern whether an error of law was made at the trial level or by a lower appellate court. The trial court or lower appellate court is often referred to as "the court below" or "the lower court" or simply as "below." The higher level appellate court decisions reproduced in our textbook, on the other hand, are often referred to as "the instant case" or "the case at bar" by the judge writing the opinion.

If the appellate court agrees with what the lower court did, it "affirms" the lower court's decision; if it feels that the lower court made an error of law, it "reverses" the lower court's decision. If the decision

is reversed, the person who was the winner at the trial level or in the lower appellate court is now the loser, and vice versa. Sometimes an appellate court will "reverse and remand" a case, which means it sends the case back to the lower court for further action (usually a new trial).

In the third paragraph of Peterson v. Romero, you see in bold type, "Sutin, Judge." (Sometimes judges are also referred to simply as "Judge," or as "J., meaning Justice," or as "C.J.," meaning for "Chief Justice." This means that Judge Sutin wrote the opinion for the majority of the Court. Appellate courts consist of several judges, usually between three and nine. After considering their cases, the judges vote the result and the majority rules. One judge in the majority is assigned to write the opinion. Sometimes a judge who is in the minority will write a "dissenting opinion" or "dissent" expressing the reasons for his or her disagreement with the majority. Dissenting opinions do not have the force of law. If a judge writes a "concurring" opinion, he is saying that he agrees with the result reached in another opinion, but not for the same reasons. A judge may concur with either the majority opinion or with a dissent.

The next part of the case sets forth the court's explanation of why it decided the case the way it did. It will frequently discuss prior cases, or precedents, decided in that jurisdiction, and will analyze whether the case presently before it is analogous to those prior cases. It will frequently discuss that underlying reasons for a relevant principle of law to show that one approach furthers some important social interest more than another possible approach. (These are examples of the doctrines discussed in your textbook under "Legal Reasoning.") After you have read an appellate opinion, you should be able to state not only what the court decided, but also why it reached that decision.

In dissecting an appellate opinion, you should answer for yourself these five questions:

1. What were the facts of the case? No one files a lawsuit unless he or she is unhappy about something. In chronological order, what events caused the plaintiff to sue the defendant?

2. What is the legal history of the case? Who were the plaintiff and defendant below? What was the decision of the trial court and lower appellate courts? Who appealed this case to this appellate court?

3. What legal issue is presented? What questions must the appellate court answer to decide the case?

4. What is the appellate court's decision ("holding")? Who wins? What is the rule or principle for which the case stands?

5. What is the appellate court's rationale for its decision? What reason(s) did the court have for deciding the case the way it did?

Many students who take notes on their reading find it helpful to

"brief" the cases, or take notes on them in a manner that is organized by the foregoing five questions. Try practicing this with Peterson v. Romero by reading the case and filling in the blanks below.

Peterson v. Romero
(sample brief)

FACTS:

CASE HISTORY:

ISSUE:

HOLDING:

RATIONALE:

When you have followed these steps, you should be able to articulate the proposition that the case stands for. You should read every case assigned to you in this way, even if you do not actually write down this analysis every time.

The last step is to think about the case critically. Ask yourself, What is the broadest proposition that the case could be interpreted to stand for? What is the most narrow interpretation of the case possible? What social interests are furthered by the decision in the case? What other approaches were possible? What would have been the social implications of those other approaches? This last step is both the hardest and the most important step, because analyzing the reasons for and the consequences of court decisions will be a focal point in this course.

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3

Peterson v. Romero

542 P.2d 434 (Ct. App. N.M. 1975)

This action for damages brought by Peterson (plaintiff) arose from an automobile collision between Romero, age 18 (defendant), and Peterson. Romero brought Hertz Corporation in as a party codefendant and sought indemnification from Hertz.

Romero sought indemnification from Hertz pursuant to terms of the auto rental contract he had entered into with Hertz despite the fact that the contract expressly provided that only persons 21 years of age or older were authorized to operate the leased autos. Romero contended that a New Mexico statute which stated, "any person who has reached his 18th birthday shall be considered to have reached his majority and is an adult for all purposes the same as if he had reached his 21st birthday," had the effect of altering the contract so as to allow 18-year-olds not only to operate Hertz autos but also to qualify for indemnity under the rental contract provisions protecting those 21 years of age or older.

SUTIN, JUDGE. The statute is broad when it states that defendant "is an adult for all purposes the same as if he had reached his 21st birthday." What is meant by the phrase "for all purposes"? We believe that the phrase "for all purposes" does not bar the right of parties to a contract to agree that "of full age" may be stipulated to mean 21 years.

The intent of the legislature is clear. Subsection B declared that the purpose of the statute was to substitute the age of 18 for the age of 21 when any prior special law fixed an adult age of 21 years, subject to the specific exception of liquor control.

"For all purposes" means that when a prior special law fixes the age of 21 years, a person of the age of 18 years is an adult, and subject to the provisions of the special law, "for all purposes" of that special law.

We can find no analogical or interpretive basis for the contention that "for all purposes" means that a person 18 years of age is an adult in every phase of law, including the law of contracts and the modification of contracts.

"The phrase 'for any purpose' . . . is not all-encompassing, but is restricted to a reasonable construction by the context of the entire statute and the purposes of the act." *Pacific Insurance Co., Ltd. v. Oregon Auto Ins. Co. (1971).* The Hawaiian Court held that where the interpretation of the phrase "for any purpose" was totally inconsistent with the purposes of the Act as well as unreasonable and absurd, a departure from a literal construction is justified even in the absence of statutory ambiguity.

We hold that a reasonable construction of § 13-13-1 (A) should not lead to the unreasonable and absurd result that the contract language "of full age (21 years)" means "18 years." Romero was not covered by the Hertz rental agreement.

Judgment for Hertz affirmed

Legal Reasoning
(McBoyle v. United States, 238 U.S. 25 (1931)

The defendant was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years imprisonment and to pay a find of $2,000. The judgment was affirmed by the Court of Appeals and the Supreme Court granted writ of certiorari, agreeing to hear the case.)

The question on appeal was whether the Motor Vehicle Theft Act of 1919 applied to defendant's actions. Section 2 of the Act provided:

"That when used in this Act: (1) the term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails....

Section 3 of the Act provided: *"That whoever shall transport or cause to be transported in interstate commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."*

Is Defendant guilty of violating the statute?

Using at least <u>three</u> techniques of statutory interpretation, explain your answer.

1.

2.

3.

Other arguments:

Chapter 1 Problems

1. John owned a cat which wandered in his yard. John was charged with violating a local ordinance which read: "It shall be illegal to permit cows, horses, goats, or other animals to wander about in a yard that is not properly fenced." The ordinance had been passed over fifty years ago when wandering animals destroyed neighbor's crops. Is John guilty of violating this ordinance? Using techniques of statutory interpretation, how would you argue that John is guilty under the ordinance? How would you argue he is not guilty of violating the ordinance?

2. Assume that the local government passed a law which banned Hungarians from attending any social functions in the community. Is there a moral obligation to obey this "law?" How would a legal positivist respond? A person who believes in natural law?

3. In the text, three classifications of positive law were discussed: civil/criminal, substantive/procedural, and public/private. Classify a state murder statute under each of these categories. Classify an negligence action under these categories.

4. Late in the evening of July 4, the local police found Tom Slick passed out at the wheel of his new BMW. The automobile was located on the shoulder of a highway. The engine was running and the lights and radio were on. The automobile was in neutral and the emergency brake was engaged. Tom tested well over the breathalizer limit for the state and was arrested for driving under the influence of alcohol. The relevant statute provided, in part:

   "...a person who operates or drives a motor vehicle while intoxicated ... shall be guilty of a misdemeanor." No statute defines "operate or drive" but "driver" is defined elsewhere as "a person who drives or is in actual physical control of a vehicle."

   Is Tom guilty of this offense? What techniques of statutory construction would you use to argue this question for the prosecution? For the defense?

5. In 1885, Congress passed a statute stating that "*it shall be unlawful for any . . . corporation . . . to . . . in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or service of any kind in the United States.*" The legislative history of this statute reveals that it was passed because American businesses were contracting with foreigners to prepay their passage to the United States. In return, immigrants agreed to work for low wages for a fixed time period. This practice reduced the bargaining power and wages of American laborers.

The Holy Trinity Church, a corporation, contracted with E. Walpole Warren, an alien residing in England, to travel to the United States and become Holy Trinity's rector and pastor. Pursuant to the contract, Warren did so. Which technique of statutory interpretation would you use in arguing that this contract is covered by the statute? Which technique would you use if you were arguing the contrary position?

Chapter 2

"Long-Arm statute" problem (based on Lebel v. Everglades Marina Inc., NJSupCt., No. A-88/6/7/89).

A buyer in New Jersey purchased a racing boat from a seller located in Florida. The buyer made arrangements to have the boat shipped to New Jersey, but it never arrived, due to an accident en route. While negotiating his claims for accidental damage, the buyer learned of possible fraud by the seller in connection with the sale. He sued the seller in New Jersey state court, demanding a return of a portion of the purchase price and other relief.

The facts indicate that one of the seller's representatives had met the buyer at a boat show in New York City. Subsequently, the seller telephoned the buyer in New Jersey at least 20 times to work out details of price and features of the boat. The seller then mailed a contract to the buyer in New Jersey, whom he knew was a New Jersey resident.

The trial court denied the defendant's motion to dismiss the complaint for lack of personal jurisdiction, on the ground that the defendant knew the plaintiff was a New Jersey resident. The appellate division reversed on the ground that insufficient minimum contacts existed, rejecting any claim to minimum contacts under a stream-of-commerce theory. The court found that there was no purposeful action in the state from which to derive benefit from New Jersey sales, that the boat never even arrived in New Jersey, and that the event was essentially a Florida, not a New Jersey, commercial transaction.

The plaintiff buyer then appealed to the New Jersey Supreme Court. The issue on appeal was whether the New Jersey courts had personal jurisdiction over the defendant.

The courts have held that due process requires that a defendant must have certain *minimum contacts* with the forum state so that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice." Do the New Jersey courts have jurisdiction in this case? Why or why not?

Trial Rule 4.4

SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

(A) Acts serving as a basis for jurisdiction. Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) Doing any business in this state;

(2) Causing personal injury or property damage by an act or omission done within this state;

(3) Causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

(4) Having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;

(5) Owning, using, or possessing any real property or an interest in real property within this state;

(6) Contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made; or

(7) Living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) Manner of service. A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) As provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or

(2) The person shall be deemed to have appointed the secretary of state as his agent upon whom service of summons may be made as provided in Rule 4.10.

(C) More convenient forum. Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial. [As amended December 7, 1970, effective January 1, 1971; amended and effective November 10, 1988.]

Chapter 2 Exercise

Dispute Settlement

8

Plastix shipped five cases of decorative boxes to Trendco, Inc., for which Trendco had agreed to pay $10,000. Plastix is a corporation incorporated in the state of Delaware with its principal place of business Bloomington, Indiana. Trendco is a Pennsylvania company, incorporated in the state of Delaware. Trendco sent Plastix a check for $8,000, claiming that the boxes in one of the cases were defective. Plastix has strict quality control procedures and is sure the boxes were not defective when they left the plant. Plastix wants the $2,000, but is concerned about maintaining good relations with Trendco, which has been a valued customer for several years.

1. What alternatives does Plastix have?

2. If Plastix decides to sue Trendco, where must it file its lawsuit?

3. Assume Plastix decides to sue; what are the steps in the lawsuit? What motions may be filed in the suit?

Chapter 2 Problems

1. Jack, a resident of Indiana, was involved in an automobile accident in California. He was sued by the other driver, a resident of Alaska, in an Alaskan state court. Jack had never been in Alaska or had any contacts with the state of Alaska. What is Jack's best response in this case? Why?

2. What are three kinds of discovery mechanisms available to the parties in a civil case? When might a party choose to employ one or more of these mechanisms?

3. Lilly was sued in state court for defamation. At the conclusion of discovery the plaintiff filed a motion for summary judgment. In order to be successful, what must the defendant prove? If the defendant is successful, what can Lilly do in response?

4. Suppose that Perry sues Davis on the theory that Davis is so ugly Perry suffers intense emotional distress in his presence. Davis thinks correctly that there is no rule of law allowing Perry to recover. What procedural device should Davis use in this circumstance? Describe.

5. Give an example where a state court and a federal district court have concurrent jurisdiction.

Lucas v. So. Car. Coastal Comm'n

Questions for Discussion

10

1. What are two categories of "takings" identified by the Supreme Court in Lucas? Can you give a hypothetical example of each?

2. How would you identify the "public purpose" in Lucas? Did the Supreme Court challenge the state's power to pass the Beachfront Management Act under its police power? Why or why not?

3. Police power regulations are presumably valid if they leave the owner with some "economically viable" use of the land. Couldn't Lucas put a cart on his property and sell hotdogs? How should "economic viability" be defined?

4. In some cases, the question of economic viability depends on whether the loss is measured by determining the loss for the entire parcel of property, or only the regulated portion. For example, in Keystone Bituminous Coal Association v. Pennsylvania, 480 U.S. 470 (1987), (another case involving a Pennsylvania statute requiring coal companies to provide underground support for the surface), the Supreme Court said the takings test should be based on an entire coal field owned by petitioners and not just the coal pillars the companies couldn't mine.

5. One very important aspect of the Lucas case is its acceptance of a "nuisance exception." This is presumably an exception which permits the government to prevent a misuse or illegal use of property without the government action constituting a taking. How should nuisance be defined? If this is purely a matter of state law, does nuisance only refer to acts recognized as nuisances in the past? Would a law which prohibited a person from killing all wildlife and flora and fauna on his land constitute a "taking" or would it fall under a "nuisance" exception? Should it?

6. On remand, the South Carolina State Supreme Court concluded that there was no common law basis on which to restrain Lucas' desired use, and therefore it remanded to the trial court for the purpose of determining damages as a result of the State's temporary taking of the property.

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Nollan v. California Coastal Commission

483 U.S. 825 (1987)

JUSTICE SCALIA delivered the opinion of the court.

The Nollans own a beachfront lot in Ventura County, California. A quarter-mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that ... the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement.

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Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them....

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome. We have long recognized that land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land...." Our

cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so, in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house--for example, a height limitation, a width restriction, or a ban on fences--so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.... [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to

serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out and out plan of extortion."

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commissions' opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes....
[The Judgment Is] Reversed.

Questions and Comments for Discussion

1. This case recognized the requirement that there be an "essential nexus" between the regulation and its purpose. What is the nexus required in this case? Was that essential nexus met in this case? Why or why not?

2. In their dissent in Nollan, Just Brennan, joined by Justice Marshall, wrote:

"The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land use planning. The Court's use of an

unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource." What are the public policy concerns which underlie the debate between the majority and dissenters in this case? Do you agree that the Nollans should be compensated in this case under a "takings" theory? What are the ethical, environmental, and social policy implications of your answer?

"Takings" Problem

(Adolph v. Federal Emergency Management Agency, CA 5, No. 87-3196, 9/13/88)

12

In order to participate in the National Flood Insurance Program, a Louisiana parish council passed building ordinances in conformance with Federal Emergency Management Agency regulations that require new or additional structures to meet certain elevation requirements. Landowners brought an action against FEMA and the parish council alleging that the building ordinances made development of their property prohibitively expensive, rendering their property unmarketable, and resulting in an unconstitutional taking of their property.

In analyzing this issue, consider the following questions:

1. Under the Supreme Court's holding in Lucas v. South Carolina Coastal Commission (in your textbook), what two categories of regulatory action are compensable without case-specific inquiry into the public interest advanced in support of the restraint?

2. Does this case fit into either of these categories?

3. If this case does not fit into either of these categories, what is the appropriate test to determine whether a taking has occurred?

4. What result in this case and why?

Problems Chapter 3

13

1. The Causbys owned 2.8 acres of land near an airport outside of Greensboro, North Carolina. On the property were a house (which the Causbys lived in) and various outbuildings used for raising chickens. The end of the airport's northwest/southwest runway was 2220 feet from the Causbys' barn and 2275 feet from their house. The path of glide to the runway passed directly over their property at 76 feet above the house, 673 feet above the barn, and 18 feet about the highest tree. The U.S. government leased the airstrip. Bombers, transports, and fighters all used the airfield. At times the airplanes came close enough to blow old leaves off trees, and the noise of the airplanes was startling. As a result of the noise, six to ten of the Causbys' chickens were killed each day by flying into the walls from fright. After losing 150 chickens, the Causbys gave up their business. They sued the U.S. government on the grounds that the government was taking their property without compensation. The lower court found for the Causbys, and the government appealed. What result and why?

2. The Minneapolis police severely damaged the plaintiff's house while attempting to apprehend an armed suspect. The police were chasing several suspected drug dealers. One suspect entered the plaintiff's house and hid in the front closet. The plaintiff's granddaughter then fled the premises and notified the police. The police surrounded the house and called in the SWAT team. After several hours of trying to get the suspect to surrender, the police fired at least 25 rounds of tear gas into the house. They broke virtually every window in the process. In addition to the tear gas, the police cast three concussion grenades into the house. They eventually apprehended the suspect crawling out of a basement window. The tear gas and grenades caused extensive damage to the plaintiff's house. Plaintiff sued the City, alleging damages of $71,000. The court below held that although there was a "taking," the taking was non-compensable under the doctrine of public necessity. The city contended that there was no taking for a public use because the actions of the police constituted a legitimate exercise of the police power. What result and why?

3. Massachusetts, in need of an interim facility for women prisoners who have been released from state prison but not yet entitled to full release, condemned a motel located near the court complex for the purpose of supplying the shelter necessary. There are several individuals opposed to the taking. The owner of the motel protests on the ground that a public purpose is not being served. The surrounding restaurant, business, and motel owners protest on the same grounds as well as on grounds that the resulting devaluation of their property and loss of income constitutes a taking of their properties for which they must be compensated. The motel owner objects further when the apprised value and compensation offer are reduced for the resulting effects on surrounding properties. Discuss the issues of public purpose, the regulating versus taking of surrounding lands, and just compensation.

14

United States v. Johnson & Towers, Inc.
741 F.2d 662 (1984)

SLOVITER, Circuit Judge

Before us is the government's appeal from the dismissal of three counts of an indictment charging unlawful disposal of hazardous wastes under the Resource Conservation and Recovery Act. In a question of first impression regarding the statutory definition of "person," the district court concluded that the Act's criminal penalty provision imposing fines and imprisonment could not apply to the individual defendants. We will reverse.

The criminal prosecution in this case arose from the disposal of chemicals at a plant owned by Johnson & Towers in Mount Laurel, New Jersey. In its operations the company, which repairs and overhauls large motor vehicles, uses degreasers and other industrial chemicals that contain chemicals such as methylene chloride and trichlorethylene, classified as "hazardous wastes" under the Resource Conservation and Recovery Act (RCRA), and "pollutants" under the Clean Water Act. During the period relevant here, the waste chemicals from cleaning operations were drained into a holding tank and, when the tank was full, pumped into a trench. The trench flowed from the plant property into Parker's Creek, a tributary of the Delaware River. Under RCRA, generators of such wastes must obtain a permit for disposal from the Environmental Protection Agency (E.P.A.) The E.P.A. had neither issued nor received an application for a permit for Johnson & Towers' operations.

The indictment named as defendants Johnson & Towers and two of its employees, Jack Hopkins, a foreman, and Peter Angel, the service manager in the trucking department. According to the indictment, over a three-day period federal agents saw workers pump waste from the tank into the trench, and on the third day observed toxic chemicals flowing into the creek...

Johnson & Towers pled guilty to the RCRA counts. Hopkins and Angel pled not guilty, and then moved to dismiss [the indictment.] The court concluded that the RCRA criminal provision applies only to "owners and operators," i.e., those obligated under the statute to obtain a permit. Since neither Hopkins nor Angel was an "owner" or "operator," the district court granted the motion as to the RCRA charges....

***

The single issue in this appeal is whether the individual defendants are subject to prosecution under RCRA's criminal provision, which applies to:

[a]ny person who-- ....

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either--

(A) without having obtained a permit under section 6925 of this title . . . or

(B) in knowing violation of any material condition or requirement of such permit. (42 U.S.C. sec. 6928(d).

The permit provision in 6925... requires "each person owning or operating a facility for the treatment, storage, or disposal of

hazardous waste identified or listed under this subchapter to have a permit" from the E.P.A.

The parties offer contrary interpretations of section 6928(d)(2)(A). Defendants consider it an administrative enforcement mechanism, applying only to those who come within section 6925 and fail to comply; the government reads it as penalizing anyone who handles hazardous waste without a permit or in violation of a permit. Neither party has cited another case, nor have we found one, considering the application of this criminal provision to an individual other than an owner or operator.

A.

As in any statutory analysis, we are obliged first to look to the language and then, if needed, attempt to divine Congress' specific intent with respect to the issue. The language of the particular section under consideration does not readily support either interpretation proffered by the opposing parties....

However, if we view the statutory language in its totality, the congressional plan becomes more apparent. First, "person" is defined in the statute as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. 6903(15)(1982). Had Congress meant in section 6928(d)(2)(A) to take aim more narrowly, it could have used more narrow language. Since it did not, we attribute to "any person" the definition given the term in section 6903(15).

Second, under the plain language of the statute the only explicit basis for exoneration is the existence of a permit covering the action. Nothing in the language of the statute suggests that we should infer another provision exonerating persons who knowingly treat, store or dispose of hazardous waste but are not owners or operators.

Finally, though the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose.

III

Since we must remand this case to the district court because the individual defendants are indeed covered by section 6928(d)(2)(A), it is incumbent on us to reach the question of the requisite proof as to individual defendants under that section. The government argues that "knowingly" applies only to "treats, stores, or disposes" of any hazardous waste, and that it does <u>not</u> have to show that the defendant knew either that the waste was hazardous or that there was no permit. Thus, the government argues, it need prove only that (1) the defendant is a "person"; (2) the defendant handled hazardous material, and (3) there was no permit for such disposal or treatment. We conclude that this interpretation is overly literal. We focus again on the statutory language.

If the word "knowingly" in section 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, as the government contends, it would be an almost meaningless addition since it is not likely that one would treat, store or dispose of

waste without knowledge of that action. At a minimum the word "knowingly" which introduces subsection (A), must also encompass knowledge that the waste material is hazardous....

Whether "knowingly" also modifies subsection (A) presents a somewhat different question.... Since we have already concluded that this is a regulatory statute which can be classified as a "public welfare statute," there would be a reasonable basis for reading the statute without any mens rea requirement.... However, whatever policy justification might warrant applying such a construction as a matter of general principle, such a reading would be arbitrary and nonsensical when applied to this statute.

...Our conclusion that "knowingly" applies to all elements of the offense in section 6298(d)(2)(A) does not impose on the government as difficult a burden as it fears. ...[U]nder certain regulatory statutes requiring "knowing" conduct the government need prove only knowledge of the actions taken and not of the statute forbidding them.... [T]he district court will be required to instruct the jury that in order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit. Depending on the evidence, the district court may also instruct the jury that such knowledge may be inferred.

***

In summary, we conclude that the individual defendants are "persons" within section 6928(d)(2)(A), that all the elements of that offense must be shown to have been knowing, but that such knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant.

QUESTIONS AND COMMENTS

1. What is the first rule of statutory interpretation utilized by the court in this case? How did the court interpret the word "person" in the statute under this rule?

2. How did the court interpret the requirement of "knowingly" in the statute? Did this term only apply to "treat, stores, or disposes" of hazardous waste (Subsection 2), or did it also apply to the requirement "without having obtained a permit" in Subsection 2(A) of the statute? What was the significance of the court's determination of this question?

3. In subsequent cases, courts have taken different, and in some cases a more liberal view of the requirement of "knowingly" in this statute. For example, in U.S. v. Dean, 969 F.2d 187 (6th Cir. 1992), the Sixth Circuit concluded that knowledge of the permit requirement under RCRA was not a prerequisite to conviction for unlawful treatment, storage, or disposal of hazardous waste without a permit. In other cases, some courts have appeared to impose liability on corporate officers under the "Responsible Corporate Officer" doctrine discussed in a following section of this chapter. Under this doctrine, the requisite willfulness or negligence of a corporate officer defendant may be imputed to him by virtue of his position of responsibility. There is, however, no consensus among jurisdictions as to whether the RCO doctrine exempts RCRA's "knowingly" requirement.

Problem : (Criminal Law)
(State v. Film Recovery Systems, Inc., Metallic Marketing Systems, Kirschbaum, Rodriquez, and O'Neil, 550 N.E.2d 1090 (1990)

15

In 1982, Film Recovery occupied premises at 1855 and 1875 Greenleaf Avenue in Elk Grove Village. Film Recovery was there engaged in the business of extracting, for resale, silver from used x-ray and photographic film. Metallic Marketing operated out of the sam premises and owned 50% of the stock of Film Recovery. The recovery process was performed at Film Recovery's plant located at the 1855 address and involved "chipping" the film product and soaking the granulated pieces in large open bubbling vats containing a solution of water and sodium cyanide. The cyanide solution caused silver contained in the film to be released. A continuous flow system pumped the silver laden solution into polyurethane tanks which contained electrically charged stainless steel plates to which the separated silver adhered. The places were removed from the tanks to another room where the accumulated silver was scraped off. The remaining solution was pumped out of the tanks and the granulated film, devoid of silver, shovelled out.

On the morning of February 10, 1983, shortly after he disconnected a pump on one of the tanks and began to stir the contents of the tank with a rake, Stefan Golab become dizzy and faint. He left eh production area to go rest in the lunchroom area of the plant. Plant workers present on that day testified Golab's body had trembled and he had foamed at the mouth. Golab eventually lost consciousness and was taken outside of the plant. Paramedics summoned to the plant were unable to revive him. Golab was pronounced dead upon arrival at the Hospital.

The Cook County medical examiner performed an autopsy on Golab the following day. Although the medical examiner initially indicated Golab could have died from cardiac arrest, he reserved final determination of death pending examination of results of toxicological laboratory tests on Golab's blood and other body specimens. After receiving the toxicological report, the medical examiner determined Golab died from acute cyanide poisoning through the inhalation of cyanide fumes in the plant air.

Defendants were subsequently indicted by a Cook County grant jury. The grant jury charged defendants O'Neil, Kirschbaum, Rodriguez, Pett, and Mackay with murder, stating that, as individuals and as officers and high managerial agents of Film Recovery, they had, on February 10, 1983, knowingly created a strong probability of Golab's death. Generally, the indictment stated that the individual defendants failed to disclose to Golab that he was working with substances containing cyanide and failed to advise him about, train him to anticipate, and provide adequate equipment to protect him from, attendant dangers involved. The grant jury charged Film Recovery and Metallic Marketing with involuntary manslaughter stating that, through the reckless acts of their officers, directors, agents, and others, all acting with the scope of their employment, the corporate entities had, on February 10, 1983, unintentionally killed Golab. Finally, the grand jury charged both individual and corporate defendants with reckless

conduct as to 20 other Film Recovery employees based on the same conduct alleged in the murder indictment, but expanding the time of that conduct to "on or about March 1982 through March 1983."

In the course of a 24 day trial, much evidence was introduced. On June 14, 1985, the trial judge pronounced judgment of defendants' guilt. He found "the mind and mental state of a corporation is the mind and mental state of the directors, officers, and high managerial personnel because they act on behalf of the corporation for both the benefit of the corporation and for themselves." Further, "if the corporation's officers, directors and high managerial personnel act within the scope of their corporate responsibilities and employment for their benefit and for the benefit of the profits of the corporation, the corporation must be held liable for what occurred in the work place."

The Criminal Code defines murder as "A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:....He knows that such acts create a strong probability of death or great bodily harm to that individual." Involuntary manslaughter is defined as "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual and he performs them recklessly."

Should defendants (individuals and corporation) be criminally liable for the death of their employee? Discuss.
(Note--on appeal, the appellate court noted that the Supreme Court of Illinois had previously found that the charges against defendants were <u>not</u> preempted by OSHA.)

Kolender v. Lawson

461 U.S. 352 (U.S. Sup. Ct. 1983)

Edward Lawson was arrested for violating Section 647(e) of the California Penal Code, which made a person guilty of a misdemeanor who

> loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

After being convicted, Lawson filed a civil suit in federal court seeking a declaratory judgment that the statute was unconstitutional, a mandatory injunction against further enforcement of the statute, and damages against the police officers who had detained him. The federal district court held that the statute was unconstitutional, and the Ninth Circuit Court of Appeals affirmed that judgment. The police officers appealed.

WHITE, JUSTICE. As construed by the California Court of Appeal, section 647(e) requires that an individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity. "Credible and reliable" is defined by the Court as "identification carrying reasonable assurances that the identification in question is authentic and providing means for later getting in touch with the person who has identified himself." In addition, a suspect may be required to "*account for his presence* to the extent that it assists in producing credible and reliable identification."

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and on arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."

Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under section 647(e). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties." In addition, section 647(e) implicates consideration of the constitutional right to freedom of movement. Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." In addition, the suspect may also have to account for his presence "to the extent that it assists in producing credible and reliable identification."

At oral argument, the police confirmed that a suspect violates section 647(e) unless "the officer is satisfied that the identification is reliable." In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, or could satisfy the identification requirement simply by reciting his name and address.

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrusts lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' " Section 647(e) "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," and "confers on police a virtually unrestrained power to arrest and charge persons with a violation."

We conclude section 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.

Judgment for Lawson affirmed.

16

Criminal Law and Procedure

LOITERING—

California statute that makes it crime to "loiter[ ] in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act" is not unconstitutionally vague.

(*California v. Superior Court of Santa Clara County (Caswell)*, Calif SupCt, No. S.F. 25040, 8/22/88)

Penal Code Section 647(d) provides that any person "[w]ho loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act" is guilty of a misdemeanor. The defendants argue that the statute is unconstitutionally vague.

To withstand a facial vagueness challenge under the Due Process Clause, a statute must satisfy two basic requirements: it must be sufficiently definite to provide adequate notice of the conduct proscribed; it must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement.

Past cases make clear that the statute is not rendered impermissibly indefinite by its use of the word "loiter." "Loiter" excludes mere waiting for any lawful purpose; it connotes lingering in a place for the purpose of committing a crime as opportunity arises. Section 647(d), of course, embraces such a "specific intent" requirement explicitly in its terms, providing that the statute is violated only when a person "loiters . . . for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act." Persons of ordinary intelligence need not guess at the applicability of the section; so long as they do not linger for the proscribed purpose, they have not violated the statute.

Nor do the words "in or about any toilet open to the public" appear misleading or cryptic. This statutory phrase is sufficiently definite such that no reasonable person could misunderstand its meaning.

Finally, the phrase "lewd or lascivious or any unlawful act," as interpreted by prior case law, also withstands constitutional scrutiny. In construing similar language in Section 647(a), we concluded that the terms "lewd" and "dissolute" refer to the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance, or offense, if the actor should know of the presence of persons who would be offended by his conduct. Section 647(d) thus satisfies the "fair notice" prong.

The defendants' principal argument is that the statute fails to set forth sufficient guidelines for law enforcement. The defendants rely heavily on *People v. Soto*, 171 CalApp3d 1158 (Calif CtApp 1985), which found Section 647(d) unconstitutional on this basis.

The *Soto* court rested its holding largely on *Kolender v. Lawson*, 461 U.S. 352, 51 LW 4532 (1983), which struck down Section 647(e)'s prohibition against loitering upon the streets without apparent reason and refusing to identify oneself or account for one's presence when requested to do so by police. The *Kolender* court held that, even if the law were interpreted to simply require one to present credible and reliable identification upon request, it was unconstitutional because it contained no standard for determining what a suspect has to do in order to satisfy that requirement.

The *Soto* court failed to take adequate account of the significant differences between the loitering provision at issue in *Kolender* and Section 647(d), and also overlooked the significant body of out-of-state decisions upholding loitering statutes—like Section 647(d)—that narrow the discretion of enforcing officials by (1) limiting the section's reach to persons who loiter with a specified illicit purpose and (2) confining the statute's operation to defined geographical locations in which loitering for the proscribed purposes has historically been a problem.

The *Kolender* court concluded that the provision in question made the definition of the crime subject to the personal standards of each individual law enforcement officer. By contrast, Section 647(d) vests no such discretion with law enforcement. The essence of this provision is loitering in a certain place with a specified criminal intent. A person is subject to arrest under the provision only if his conduct gives rise to probable cause to believe that he or she is loitering in or about a public restroom with the proscribed illicit intent.

We disagree that Section 647(d) is constitutional only if it is interpreted to require that the defendant commit an independent criminal act. The defendants contend that under any other interpretation Section 647(d) would confer upon the police the power to arrest suspicious persons solely on the basis of innocent conduct. But we can readily envision numerous situations where non-criminal conduct may legitimately give rise to probable cause to believe an individual is in violation of Section 647(d). For example, an officer may personally know an individual and be aware that he has repeatedly solicited or committed lewd acts at the same location in the past. Under such circumstances, if the officer observes the individual linger suspiciously in the restroom for an inordinately long time, he might properly infer that the suspect did not have an innocent intent. Probable cause might also arise from an informer's tip that an individual has disclosed his intent to frequent a particular restroom to attempt to solicit acts, or from citizens' complaints that an individual was lingering inside a restroom engaging in suggestive conduct.

Section 647(d) is not the only law that defines a crime in terms of a non-criminal act coupled with a specific intent. Both criminal attempt and conspiracy may consist of an otherwise innocent act coupled with the specific intent to commit a crime, and Section 647(d), like attempt and conspiracy, specifies an overt act: loitering near a public restroom. Although the defendants characterize this as "mere presence" at a certain place, "mere presence" can, in some circumstances constitute the actus reus of a crime, e.g., trespass. Thus, "mere presence" can constitute a criminal act where it is coupled with criminal intent.—Arguelles, J.

Dissent. To be vulnerable to prosecution, a person must linger near a restroom and think or fantasize about improper sexual acts or any other crime on the books. No overt act is required—just thoughts. There are adequate laws on the books to prevent illegal conduct. But when we invade the thought process of individuals, we step over the line into a constitutionally impermissible area.—Mosk and Broussard, JJ.

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

JAMES W. HELTON, II, Appellant-Defendant,	)	
vs.	)	No. 55A01-9305-CR-178
STATE OF INDIANA, Appellee-Plaintiff.	)	

CASE SYNOPSIS

CHARGE

On June 1, 1992, the State charged James W. Helton, II, by information, with Participating in Criminal Gang Activity, a Class D felony, in violation of IND. CODE 35-45-9-3.[1]

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[1]I.C. 35-45-9-3 provides:

A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

I.C. 35-45-9-1 provides:
As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:
(1) either:
(A) promotes, sponsors, or assists in; or
(B) participates in; and

(Footnote Continued)

FACTS

James Helton is a member of the Imperial Gangster Disciples (IGD), a twelve member youth group. In October 1991, while Helton was second in command, he and other IGD members initiated Scott Bullington into IGD. In February 1992, Helton and two other members initiated Travis Hammons, with Helton inflicting most of the blows. The initiation rite, called "a 46," involved being struck forty times in the head and six times in the chest. Both Bullington and Hammons knew of the initiation rite and voluntarily consented to "a 46" by Helton and other members in order to become IGD members.

At Hammons' initiation, IGD members discussed the need to travel in pairs and to be aggressive with others, determined that anyone who missed an IGD meeting would "get violated" (receive six blows to the chest), and decided that anyone leaving IGD would be "eight-balled" (surrounded by eight members and then beaten by them). Record at 223-24, 225, 227, 240.

On April 24, 1992, Helton was charged by information with participation in a criminal gang. On June 3, 1992, the information was amended to charge Helton with criminal gang activity. Helton waived his right to a jury trial and on January 21, 1993, the trial court found Helton guilty of criminal gang activity under I.C. 35-45-9-3. The trial court sentenced Helton

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(Footnote Continued)

(2) requires as a condition of membership or continued membership;

the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery (IC 35-42-2-1).

to three years imprisonment, suspended so long as he complied with the terms of his probation. Helton now appeals.

PARTIES' CONTENTIONS

I-III. Constitutionality

Helton first contends Indiana's Criminal Gang Activity statute, I.C. 35-45-9-3, is void under the First and Fourteenth Amendments to the U.S. Constitution and Article 1, § 9 of the Indiana Constitution because it is unconstitutionally vague. Secondly, Helton argues I.C. 35-45-9-3 is unconstitutionally overbroad and violates his right of association guaranteed under the First Amendment of the U.S. Constitution and Article 1, § 9 of the Indiana Constitution. Finally, Helton argues the statute is unconstitutional under the Fourteenth Amendment to the U.S. Constitution and Article I, § 23 of the Indiana Constitution because it denied him equal protection of the laws because it is applied in a discriminatory manner to groups deemed undesirable by the prosecutor.

The State responds that I.C. 35-45-9-3 is constitutional. The State contends that the statute is not unconstitutionally vague because it adequately informs individuals of ordinary intelligence of the proscribed conduct. Next, the State contends the statute is not unconstitutionally overbroad because it does not prohibit a substantial amount of protected conduct. Finally, the State argues the statute is not unconstitutional under the Equal Protection Clause because gangsters are not a protected class and because there is no fundamental right of association in an organization which exists to perpetrate criminal acts.

PROBLEMS IN CRIMINAL LAW

1. On October 9, 1979, the Defendant, her boyfriend, and two other teenagers drove to the vicinity of the St. Ignatius Retreat Home in Nassau County, New York. Defendant was a passenger in the car and thought she was headed for a public park located across the street from the Retreat Home. However, her boyfriend, the driver of the vehicle, failed to identify the park entrance and instead drove onto the grounds of the Retreat House where all the occupants were detained and subsequently charged with criminal trespass. Defendant never left the automobile. What is Defendant's best defense in this case? (People v. Shaughnessy, 319 N.Y. S. 2d 626 (1972).

2. Margaret Papachristou and Betty Calloway, two white females, and Eugene Melton and Leonard Johnson, two black males, were convicted of violating a Jacksonville, Florida, vagrancy ordinance. At the time of the arrest, they were riding in Calloway's car on the main thoroughfare in Jacksonville. The arresting officers denied that the racial mixture in the car played any part in their decision to make the arrest. They argued that the arrest was made because the defendants had stopped near a used-car lot that had been burglarized several times. The ordinance provided in part, that "rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers...[or] persons wandering or strolling around from place to place without any lawful purpose or object...shall be deemed vagrants" and be guilty of a misdemeanor. The defendants appealed their conviction, arguing that the ordinance was unconstitutional. Are they correct?

3. A police officer, in order to check out a tip that marijuana was being grown in a backyard, climbed 40 feet up into a tree 75 yards outside the backyard of a house. Using binoculars to look into the yard, the officer discovered marijuana plants growing in the yard behind the house. If the defendant homeowner moves to suppress admission of the evidence under the Fourth Amendment, what result is likely and why? (Kizmiller v. Maryland)

Cora Irene CRASE, Plaintiff-Appellant,
v.
HIGHLAND VILLAGE VALUE PLUS PHARMACY,
Defendant-Appellee.
No. 1-777A145.
Court of Appeals of Indiana,
First District.
March 30, 1978.

ROBERTSON, Judge.

On April 9, 1976, plaintiff-appellant Cora Irene Crase filed a complaint for damages against Highland Village Value Plus Pharmacy (Pharmacy) for an alleged false imprisonment. Crase appeals the decision of the trial court which granted the defendant-appellee Pharmacy summary judgment.

The facts are as follows. On May 17, 1975, Crase completed her business in the Pharmacy and left the premises. She entered the adjacent grocery and shortly thereafter was stopped by William Cowden. Cowden tapped her on the shoulder and said, "Ma'am, would you come outside, I'd like to talk to you." Crase, who did not know Cowden, was reluctant to accompany him. She asked, "Well, who are you and what do you want?" After Cowden identified himself as a police officer and displayed his badge, she followed him outside. Cowden then said, "Ma'am, you know that stuff you were looking at in there?" Crase answered, "Yes", and Cowden continued, "Well, there was seven of them on the stack and now there is only six. You didn't pay for one." After stating that she had laid it back on the shelf, Crase offered to accompany Cowden back into the pharmacy in order to prove to him that she had not stolen anything. At this point, Cowden said that he did not want to cause a scene but that normally people are arrested for shoplifting. In a further attempt to vindicate herself, Crase emptied her purse. Cowden then apologized, and, after suggesting that Crase might want to talk to the manager, he departed.

After Crase completed her grocery shopping, she returned to the pharmacy for the purpose of reporting the incident to the manager but was too upset to speak with him. In her deposition, Crase listed doctor visits and a detrimental effect on her job as being caused by the incident.

It is Crase's contention that there was a genuine issue of material fact concerning whether she was falsely imprisoned by the Pharmacy's agent, who, allegedly without probable cause, stopped and interrogated her outside an adjacent grocery store.

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The essence of Pharmacy's memorandum in support of its motion for summary judgment was that Cowden's conduct did not constitute an arrest or detention and that even if it did, he had probable cause to believe a theft had taken place and therefore had a right to detain Crase.

The trial court, in granting Pharmacy's motion for summary judgment, found that "the facts most favorable to the plaintiff herein do not show any acts on the part of the defendant or its agent which constitute an actionable arrest, confinement, detention or imprisonment." The trial court found further that Crase could not have sustained any damages attributable to pharmacy or its agent.

While the trial court did not articulate any specific basis for the granting of summary judgment, we infer from the language of the order either or both of two likely bases. The first is that Crase did not present a prima facie case of false imprisonment; the second is that the trial court determined, as a matter of law, that there existed probable cause to detain thus providing Pharmacy with a statutory defense to the complaint.

False imprisonment has been defined as an unlawful restraint upon one's freedom of locomotion or the deprivation of liberty of another without his consent. 14 I.L.E. False Imprisonment Sec. 1 (1959); Brickman v. Robertson Brother Department Store (1964), 136 ind.App. 467, 472, 202 N.E.2d 583, 586.

In Brickman, the plaintiff obtained permission to exchange some socks, then proceeded to make the exchange himself. After the plaintiff exited the store, the store detective grabbed his arm, stopping his forward progress, and in a voice carrying authority ordered the plaintiff back into the store. This court concluded that Brickman had made a prima facie case of false imprisonment.

[2] Similarly, we conclude that the facts contained in Crase's pleadings and affidavit, when taken as true, would permit an inference that there was an unlawful restraint upon Crase's freedom of locomotion of deprivation of her liberty without her consent. Thus, it is our view what Crase has presented a prima facie case enabling her to overcome a motion for summary judgment directed to this point.

[3] As Crase's and Cowden's accounts of the incident are in conflict in some significant respects, there is indeed a question of fact present, and questions of fact relating to the existence and involuntary character of a detention are to be determined by the trier of fact. 35 C.J.S. False Imprisonment Sec. 59 1960).

Our determination that there are material questions of fact regarding the existence and involuntary character of a detention does not automatically dictate reversal and remand of this case. The mercantile setting of the alleged detention raises the Possibility that the summary judgment was granted because the trial court found there was, as a matter of law, probable cause to detain Crase.

Subsequent to the Brickman decision, the Shoplifting Detention Act was enacted which permitted a security agent of a mercantile establishment to lawfully detain a person for a reasonable time. IC 1971, 35-3-2-1 (Burns Code Ed.), provides as follows:

An owner, operator, manager, employee over the age of eighteen [18] years or security agent of a mercantile establishment who has probable cause to believe that a theft has occurred or is occurring on or about said mercantile establishment and who has probable cause to believe that a

specific person has committed or is committing the theft, may detain that person to require such person to identify himself, to verify such identification, to determine whether such person has in his possession unpurchased merchandise taken from such mercantile establishment, to inform the appropriate peace officers, or to inform the parents or other private persons interested in the welfare of the person detained. Such detention shall be only for a reasonable time, not to extend beyond the arrival of a peace officer or one [1] hour, whichever first occurs, and in a reasonable manner.

Further, IC 1971, 35-3-2-2 (Burns Code Ed.) provides:
No civil or criminal action against an owner, operator, manager, employee or security agent of a mercantile establishment or a peace officer shall be based upon a lawful detention as provided for in section 1 [35-3-2-1] of this act; Provided, however, the defendant in any such action shall have the burden of proof that he acted with probable cause as provided for in section 1 [35-3-2-1] of this act.

[4] It seems clear that the Shoplifting detention Act was a response by our General Assembly to a long continuing epidemic of shoplifting which has beset merchants. The purpose of the Act was to provide some measure of immunity from liability for a merchant or one acting in his behalf where such merchant or one acting in his behalf detains someone suspected of theft of the merchant's property.

[5] The Act did not, however, confer absolute immunity from liability. The protection of the Act is not extended unless there is probable cause to believe both that a theft has occurred or is occurring on or about the mercantile establishment and that a specific person has committed or is committing the theft. It is this "probable cause to believe" which makes a detention under IC 35-3-2-1 lawful, and if a detention is lawful, by definition, it cannot constitute false imprisonment.

[6] Although the Shoplifting Detention Act provides a statutory defense to an action for false imprisonment, the defendant in such an action still has the burden of proof to demonstrate that probable cause to detain existed.

[7] In the instant case, we note that Crase's account of the events leading up to the confrontation with Cowden is susceptible of a reasonable inference that there was no probable cause to believe that a theft had been or was being committed. Further, Crase's and Cowden's accounts of these events regarding probable cause are controverted and must await a determination the trier of fact. Thus, the court could not, at this juncture, properly have concluded that Pharmacy had a statutory defense as a matter of law and could not properly have based the summary judgment on such a defense.

As we have concluded that it is not "perfectly clear" that there was no detention or that Cowden had probable cause to believe a theft had been or was being committed, we must reverse and remand for a trial on the merits.

Reversed and remanded.

IC 1971, 35-3-2-1 (BURNS CODE ED.), PROVIDES AS FOLLOWS:

AN OWNER, OPERATOR, MANAGER, EMPLOYEE OVER THE AGE OF EIGHTEEN [18] YEARS OR SECURITY AGENT OF A MERCANTILE ESTABLISHMENT WHO HAS PROBABLE CAUSE TO BELIEVE THAT A THEFT HAS OCCURRED OR IS OCCURRING ON OR ABOUT SAID MERCANTILE ESTABLISHMENT AND WHO HAS PROBABLE CAUSE TO BELIEVE THAT A SPECIFIC PERSON HAS COMMITTED OR IS COMMITTING THE THEFT, MAY DETAIN THAT PERSON TO REQUIRE SUCH PERSON TO IDENTIFY HIMSELF, TO VERIFY SUCH IDENTIFICATION, TO DETERMINE WHETHER SUCH PERSON HAS IN HIS POSSESSION UNPURCHASED MERCHANDISE TAKEN FROM SUCH MERCANTILE ESTABLISHMENT, TO INFORM THE APPROPRIATE PEACE OFFICERS, OR TO INFORM THE PARENTS OR OTHER PRIVATE PERSONS INTERESTED IN THE WELFARE OF THE PERSON DETAINED. SUCH DETENTION SHALL BE ONLY FOR A REASONABLE TIME, NOT TO EXTEND BEYOND THE ARRIVAL OF A PEACE OFFICER OR ONE [1] HOUR, WHICHEVER FIRST OCCURS, AND IN A REASONABLE MANNER.

FURTHER, IC 1971, 35-3-2-2 (BURNS CODE ED.) PROVIDES:

NO CIVIL OR CRIMINAL ACTION AGAINST AN OWNER, OPERATOR, MANAGER, EMPLOYEE OR SECURITY AGENT OF A MERCANTILE ESTABLISHMENT OR A PEACE OFFICER SHALL BE BASED UPON A LAWFUL DETENTION AS PROVIDED FOR IN SECTION 1 [35-3-2-1] OF THIS ACT; PROVIDED, HOWEVER, THE DEFENDANT IN ANY SUCH ACTION SHALL HAVE THE BURDEN OF PROOF THAT HE ACTED WITH PROBABLE CAUSE AS PROVIDED FOR IN SECTION 1 [35-3-2-1] OF THIS ACT.

Problem (Battery)
(Barbara A. v. John G., 145 Cal. App. 3d 369 (1983))

John G., an attorney, filed an action in municipal court against appellant, Barbara A., for $1,520 in fees for representing her in a family law matter. Appellant filed her answer and a cross-complaint for damages against defendant.

A summary of the facts is as follows. Appellant and respondent met about April 1978. Appellant retained respondent, an attorney, to represent her in a postdissolution proceeding for modification of spousal support and child support for her three children. The legal relationship was in existence at the time of the alleged events. On two occasions, June 25 and June 30, 1978, she and respondent had sexual intercourse with each other. Before they engaged in sexual intercourse the first time, the appellant demanded that respondent use a contraceptive device (a condom) and explained that for emotional and financial reasons she did not want to become pregnant. Appellant further told her "...that she would not engage in sexual intercourse with him if there was any likelihood of her becoming pregnant;..." Respondent told appellant not to worry, saying, "I can't possibly get anyone pregnant." She understood this to mean that he was sterile by nature or as the result of a vasectomy.

Respondent's presentation about his procreative inability was false and he knew it was false. It was made with the intent to induce appellant to engage in sexual intercourse, protected or not. Relying on respondent's assurance of his sterility, appellant consented to and did engage in sexual intercourse with respondent. As a result of sexual intercourse with respondent, appellant became pregnant. The pregnancy was determined to be tubal, and as a consequence, appellant was forced to undergo surgery to save her life. Her fallopian tube was removed, and she was rendered sterile by the surgery. She suffered physical, emotional, and financial injuries as a result of the pregnancy.

Has respondent (Barbara G.) stated a cause of action for damages in this case? Under what theory or theories? Discuss.

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No. 86-1278

HUSTLER MAGAZINE AND LARRY C. FLYNT, PETITIONERS *v.* JERRY FALWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Syllabus

No. 86-1278. Argued December 2, 1987—Decided February 24, 1988

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia*, libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

Held: In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here.

797 F. 2d 1270, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment. KENNEDY, J., took no part in the consideration or decision of the case.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co. Respondent stated in his complaint that publication of the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.[1] At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners.[2] Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell* v. *Flynt*, 797 F. 2d 1270 (CA4 1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F. 2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York Times* standard is satisfied by the state-law require-

[1] While the case was pending, the ad parody was published in Hustler magazine a second time.

[2] The jury found no liability on the part of Flynt Distributing Co., Inc. It is consequently not a party to this appeal.

ment, and the jury's finding, that the defendants have acted intentionally or recklessly.[3] The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276.[4] Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari.

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503–504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339 (1974). As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press* v. *Walker*, decided with *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times*, *supra*, at 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 274 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co.* v. *Sullivan*, *supra*, we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U. S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require "'breathing space.'" *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 772 (1986) (quoting *New York Times*, 376 U. S., at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the

[3] Under Virginia law, in an action for intentional infliction of emotional distress a plaintiff must show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe. 797 F. 2d, at 1275, n. 4 (citing *Womack* v. *Eldridge*, 215 Va. 338, 210 S. E. 2d 145 (1974)).

[4] The court below also rejected several other contentions that petitioners do not raise in this appeal.

free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events—an exploration often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill, 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, The Political Cartoon 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978):

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745–746.

See also *Street* v. *New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is "'vulgar,' 'offensive,' and 'shocking'" is "not entitled to absolute constitutional protection under all circumstances." 438 U. S., at 747. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), we held that a state could lawfully punish an individual for the use of insulting "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571–572. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc.* v. *Hill*, 385 U. S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[1] The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as de-

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[1] Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986–1987).

scribing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F. 2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, concurring in the judgment.

As I see it, the decision in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

ALAN L. ISAACMAN, Beverly Hills, Calif. (DAVID O. CARSON and COOPER, EPSTEIN & HUREWITZ, on the briefs) for petitioners; NORMAN ROY GRUTMAN, New York (JEFFREY H. DAICHMAN, THOMAS V. MARINO, GRUTMAN, MILLER, GREENSPOON & HENDLER, on the briefs) for respondent.

Problems in Intentional Torts

1. Rhonda "borrowed" her friend Lola's car (without Lola's consent) and accidentally set fire to it when she dropped a lit cigarette under the seat. If Lola sues Rhonda for the value of the automobile, under what theory should she be entitled to recover damages?

2. Good Stuff, Inc., a kitchenware store headquartered in Bloomington, Indiana, opened a new store in a shopping mall near Louisville, Ky. Two weeks later, an editorial appeared in the Louisville Journal, which made several unflattering statements about the store and its employees (whose number was in excess of 100.) The editorial described the store's goods as "cheaply made and too expensive" and the store's employees as "the biggest collection of nuts we've ever seen under one roof." If the store and the employees sue for defamation, what result and why?

3. Jed's roommates played a trick on him by abducting him from his room and tying him up in his underwear on his girlfriend's porch. Jed, who was intoxicated, slept through the whole incident and didn't wake up until the next morning, after his girlfriend had untied him and dressed him. Under what legal theories, if any, is Jed entitled to recover damages from his "friends" under these facts?

4. Tacky Mart, a discount clothing store located in a small college town, had experienced serious problems with shoplifters. One evening, Gubbins, an off-duty officer hired by Tacky Mart, saw Sally Student walking toward the store's exit with what appeared to a large object under her sweatshirt. Thinking that Sally was trying to steal something, Gubbins tackled her, shouting, "Caught you red-handed, you thieving college punk!" What appeared to be an object under Sally's sweatshirt was a congenital deformity. Several persons overheard Gubbins' remark, and Sally later sued Gubbins and Tacky Mart for battery, false imprisonment, and defamation. State law affords storeowners a conditional privilege. Should Sally's suit be successful?

5. Don Dolt, a disgruntled student in Professor Nurd's accounting class, hung a sign over the front door of the business school which read: "Nurd flunked the CPA exam three times." Dolt put the sign up at 7:00 a.m.. Ten minutes later, Nurd arrived and tore down the sign. At most, three other people saw the sign. Enraged over the

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disclosure of his most shameful secret, Nurd filed suit against Dolt for defamation and invasion of privacy. Should Nurd win on either claim?

6. Frank Futz, a political analyst for the local newspaper, published a series of articles about questionable business dealers and personal associations on the part of the Mayor. He alleged that the Mayor was arrested for child molestation in 1980 in Alabama. The allegation is untrue, and Futz had no reliable source for the story. The Mayor sued Futz for defamation. Should the Mayor win? Why or why not?

Business Law

Negligence

Jersey City Redevelopment Authority v. PPG Industries
18 ELR 20364 (D.N.J. Sept. 3, 1987)

SAROKIN, J.:

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During the years 1954 through 1964, PPG, either directly or through a subsidiary, owned and operated a plant located on Garfield Avenue in Jersey City, which processed raw chromium ore. During the processing of the chromium ore a residue mud was produced which contained chromium. As a result of the process, large piles of this residue or waste mud existed at the Garfield Avenue property. During the period of January 1958 until July 1963, it is estimated that 73,200 tons of waste mud were produced. During this period the waste mud was routinely removed by various contractors and utilized as fill material in various construction projects including public works projects. Among the contractors who utilized such material for fill purposes was the defendant Lawrence Construction Company.

It is undisputed that as early as 1954 PPG was aware that there were potential health hazards associated with the processing of chromium ore. Employees who were exposed to the process within the plant sustained nasal perforations, skin ulcers, also known as chrome sores, and lung cancer. Those risks were set forth in a detailed report prepared in 1954 by the Industrial Hygiene Foundation of America, and said report was circulated to companies involved in this industry including PPG.... In July of 1963 PPG ceased production at the Garfield plant and in 1964 sought purchasers.

Lawrence Construction had acquired fill from the property and utilized it prior to the time the property was available for sale. Cliff Associates and Lawrence were related companies and Clif Associates determined to place a bid for the purchase of the premises. Representatives of Lawrence and Clif were aware that the PPG plant had processed chromium ore, but were unaware of any of the specific health hazards as enumerated above....

[The court then recounted that on July 13, 1964, PPG and Clif entered into an agreement for the purchase of the site. After the purchase, in 1973 Lawrence and Clif became aware that chromium ore existed in the soil based upon a report they had received from a testing lab.]

PPG knew that there were some minor health risks to direct exposure to chromium even in the residue, and knew or should have known, based upon their specialized knowledge, that the chrome might present environmental risks. Furthermore, it was certainly foreseeable that Lawrence would utilize the fill itself and permit others to use it, since that had been the practice while PPG was the owner of the property....

On November 25, 1974, plaintiff (Jersey City Redevelopment Authority, a municipal corporation) and defendant Ambrosio entered into an agreement for demolition and site clearance on the premises

owned by the plaintiff, located on Ninth Street in Jersey City. Ambrosio demolished the buildings located at that site. As part of the demolition, it filled the basements of the building which were demolished with brick and other debris, and some fill material from an excavation from a nearby sewer project. The balance of the fill came from the Garfield Avenue property, having been purchased by Ambrosio from Lawrence. [Subsequently, in May, 1982, the City advised PPG that there might be contamination at the Garfield site. In August, 1983, the New Jersey Department of Environmental Protection required the plaintiff to take measures necessary to protect the public health and environment. The plaintiff incurred $709,864.22 in expenses.]

Count 7: Negligence

The court concludes that the negligence of both PPG and Lawrence/Clif caused plaintiff's injuries.

PPG acted negligently in conveying Garfield Avenue to Lawrence/Clif without properly advising Lawrence of the potential risks of chromium contamination. The court has found that PPG knew, at the time of the sale, that there were major health risks associated with the inhalation of chromium and some minor health risks from direct exposure to chromium even in the residue. Moreover, PPG knew or should have known, based on their specialized knowledge, that the chromium in the soil might present environmental risks. Furthermore, PPG knew that Lawrence/Clif would use the fill itself and sell it to others--PPG had sold Garfield Avenue fill int he past, including sales to Lawrence itself. Given these facts, PPG was under a duty to advise the purchaser of the property, at a minimum, of the potentiality of such risks even if it was unable to specify it.

PPG's breach of its duty proximately caused plaintiff's injury. As stated above, PPG plainly should have foreseen that Lawrence/Clif would sell chromium-contaminated fill to others. As explained in connection with Count 3, Lawrence/Clif's negligence does not relieve PPG of liability. PPG should not benefit from the fact that Lawrence/Clif gained independent knowledge of the fills' environmental hazards and failed to act thereupon. That Ambrosio actually transported the fill from Garfield Avenue to Ninth Street does not alter this conclusion.

Lawrence/Clif acted negligently in distributing chromium-contaminated fill without warning the purchaser. Lawrence/Clif, at the time it sold fill to Ambrosio, knew that the fill contained chromium and knew that the fill had caused problems with its foundations. Under these circumstances, Lawrence/Clif had a duty to Ambrosio--extending to plaintiff, a foreseeable user of the contaminated soil--to at least notify that the fill contained chromium. Without this knowledge, neither Ambrosio nor plaintiff, its customer, could evaluate whether to risk use of this fill. Furthermore, Lawrence/Clif's breach of this duty was a proximate cause of the contamination at Ninth Street.

The court holds liable PPG and Lawrence/Clif under Count 7.

Questions and Comments for Discussion

1. Summarize the facts in the above case. Who was the plaintiff? Why did the plaintiff sue the defendants? According to the plaintiff, what acts or omissions of the defendants constituted negligence? As you can see, the facts are extremely important in determining liability. What might the defendants have done to avoid liability for negligence in this case?

2. As noted in the text, the plaintiffs sued the defendants under several different theories in this case. Theories argued by plaintiff included (1) that the defendants were responsible parties under CERCLA, (2) the defendants engaged in an abnormally dangerous activity, (3) trespass and nuisance, (4) negligence, (5) breach of contract, and (6) fraud and misrepresentation. What would the plaintiffs have to establish to recover damages under each of these theories? What legal problems might arise under these facts in an attempt to establish trespass and nuisance under these facts?

3. The defendants PPG and Lawrence/Cliff were found <u>joint and severally</u> liable by the court under a negligence theory. Under joint and several liability, both defendants are liable for the entire amount claimed by plaintiff. This does not mean that the plaintiff can recover damages twice; it may, however, collect the entire amount from either defendant. What are the policy implications of this rule?

4. Unlike defendants PPG and Lawrence/Cliff, Ambrosio was held <u>not</u> liable under a negligence theory in this case. The court said Ambrosio bought fill from Lawrence/Clif and transported it to Ninth Street without knowledge that the fill contained chromium residue. The court said that Ambrosio's knowledge that Garfield Avenue at one time was a chrome processing plant created no independent duty to test the fill for potential chromium contamination, and that Ambrosio did not act negligently in transporting the fill. Do you agree with the Court's decision not to impose a special duty on Ambrosio to test the fill for contamination? The court's holding as to Ambrosio is a good example of the requirement that a party must breach a legal duty to be liable to another under a negligence theory.

5. What standard of care were defendants required to meet in this case? Note that in general, a purchase/sale agreement does <u>not</u> create a special duty between buyer and seller. Most states, however, have imposed upon the seller of residential property a <u>duty to disclose</u> material defects in the property if they are known to and not discoverable by the buyer. Whether this duty to disclose extends to sellers of commercial property is a policy question that is not settled in all the states. Negligent or intentional misrepresentation, including misrepresentation through non-disclosure, may be a basis for recovering damages in tort or for rescinding a contract for the sale or lease of property.

Problems in Negligence

1. Dion T. DiOssi sustained injuries while employed as a parking valet at a party given by C. Ronald Maroney, when a car driven by an intoxicated 19 year old man struck him. Does a social host who serves alcohol to a minor who then injures a third person have a legal obligation to the person injured?

2. An employee consumed beer at a picnic sponsored by an employee association. After leaving the picnic, he proceeded to a bar, where he continued to drink; he was subsequently involved in a head on collision in which the driver of the second car was seriously injured. Is the association liable to the injured driver?

3. A woman who was sexually assaulted by an underage tavern customer sued her attacker and the owners of the business. The victim and Williams met at the bar. He offered her money for gasoline in exchange for a ride home. He drew a knife and raped her in the car. According to the lawsuit, Williams got past employees who were supposed to check identification at the door. The lawsuit claims the club owners failed to detect an underage drinker who was carrying a knife and served numerous drinks to him "past the point of intoxication."

4. Decedent was killed in a collision when he drove a borrowed automobile eastward into a west bound traffic lane after drinking. Liability was asserted against the decedent's employer under the theory of negligent entrustment. The decedent borrowed a car from his employer to work on a construction project away from home. He drove the vehicle to the job and worked until the project was completed. Thereafter, in the presence of his employer, the decedent had a beer with his coworkers. Then everybody, including the employer, went to a restaurant for lunch, where the decedent had another beer. After lunch, the employer declined to join the others in the bar and left. At that point the employer observed nothing about the decedent's behavior to indicate he was intoxicated. Can the employer be liable under the doctrine of negligent entrustment?

5. John had a large party at his apartment on the weekend of "Little 500." There was a large cooler on his back porch which contained cans of beer, and his guests helped themselves. At one point in the party, John noticed that his friend Dave was visibly intoxicated and he suggested he "slow down" in his drinking. However, Dave continued to drink beer from the cooler. Later that night, as Dave was driving home from the party while intoxicated, he struck a car driven by Mary. Mary was injured and sued Dave and John for damages. John filed a motion for summary judgment, arguing that he was entitled to judgment as a matter of law under these facts. Can John be liable to Mary under the holding of Ashlock v. Norris?

1. Michelle was injured when she was forced to detour around a snow-covered sidewalk in front of her neighbor's house. She crossed the street and was bitten by a wild skunk which had hidden behind a tree on the opposite sidewalk. Assuming there is an ordinance in her city that requires property owners to shovel snow from their sidewalk within 12 hours of snowfall, and the neighbor had failed to do so, may she recover damages from her neighbor? Why or why not?

2. What is the "zone of danger" test employed by some courts in determining liability for negligent infliction of emotional distress? Give an example of such a case.

3. While shopping at the local Thrifty Mart, Larry Lozier slipped and fell on a banana peel, breaking his hip. The evidence indicated that the banana peel was dark brown in color and gritty in texture because numerous customers more fortunate than Larry had stepped on it without falling. Larry files a negligence suit against Thrifty Mart. At trial, the only defense raised by Thrifty Mart is that none of the store's employees had any actual knowledge of the banana peel's presence. Is this a good defense? Why or why not?

4. Todd suffered from severe allergies and the medicine prescribed by his physician to alleviate his symptoms tended to make him drowsy. Despite his doctor's warning that he shouldn't drive while taking the medication, Todd drove to a concert. Ashley Prickett, age 5, darted into the path of Todd's car from between two parked vehicles and was hit and seriously injured. The facts indicate that Todd was driving at the legal speed limit and he could not have avoided Ashley even if he had not been taking medication. The trial court dismissed Ashley's negligence suit against Todd. Was it correct in doing so? Why or why not?

5. Jones, an employee of Maxwell's garage, insists on using gasoline rather than nonflammable solvents to clean mechanical parts because, in his words, "nothing works like gasoline." One day, Ralph absentmindedly lights a cigarette while cleaning some parts. The resulting explosion severely injures Ralph and burns down Maxwell's garage and the massage parlor next door. In addition, Ralph's dog Spot is set ablaze and Spot runs 2 blocks before collapsing on the porch of a house belonging to Thomas. Thomas's house is set on fire and burns to the ground. The owners of the massage parlor and Thomas sue Ralph for negligence. Is Ralph liable to one or both? Discuss.

Strict Liability

Intentional or negligent behavior may result in liability for environmental harms caused to another. Under the theory of strict liability, a person who particpates in certain harm-producing activities may be held liable for harm that results to others, even though he did not intend to cause the harm, and even though he did everything possible to prevent it.

Imposition of liability under the theory of strict liability is a social policy decision. The rationale underlying strict liability is that the risk associated with some activities should be borne by those engaged in that activity rather than by the person who is exposed to the risk. Most courts hold that even if the other person is negligent himself, contributory negligence is not a bar to recovery under strict liability, although assumption of the risk is generally a good defense in a strict liability action.

The justification for imposing strict liability upon defendants who engage in certain abnormally dangerous or ultrahazardous activities is that the person who voluntarily engages in that activity can ultimately pass the costs of liability on to other consumers, and in this way can "spread the risk" of liability for the activity. You may be aware of one class of activities for which strict liablitity is imposed--the manufacture or sale of defective and unreasonably dangerous products.

Certain environmentally dangerous activities, for example operating a hazardous waste landfill, may be designated an abnormally dangerous or ultrahazardous activity for which strict liability may be imposed. The decision to designate a particular activity as abnormally dangerous for purposes of this theory is of course an important policy decision for the courts. Obviously, imposing strict liability for certain activities will make conducting that activity riskier and more expensive for the operator. In some cases, people may be reluctant to engage in the activity at all.

Courts generally consider several different factors in making the determination that an activity is abnormally dangerous or ultra hazardous for purposes of imposing strict liability. In Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990), for example, the question before the court was whether a shipper of hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route. In making the determination not to impose strict liability on the shipper of hazardous chemicals, the court reviewed section 520 of the Restatement (Second) of Torts which lists factors to be considered in making that determination. The court said:

"The roots of section 520 are in nineteenth-century cases. The most famous one is Rylands v. Fletcher(1868), but a more illuminating one in the present context is Guille v. Swan, 19 Johns (N.Y.) 381 (1822). A man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he

landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of balloooning it was impossible to make a pinpoint landing.

Guille was a paradigmatic case for strict liability: (a) The risk (probability) of harm was great and (b) the harm that would ensue if the risk materialized could be, although luckily was not, great (the balloonist could have crashed into the crowd). The confluence of these two factors established the urgency of seeking to prevent such accidents. (c) Yet such accidents could not be prevented by the exercise of due care; the technology of ballooning was insufficiently developed. (d) The activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable riskiness. (e) The activity was inappropriate to the place in which it took place--densely populated New York City. (f) Reinforcing (d), the value to the community of the activity of recreational ballooning did not appear to be great enough to offset its unavoidable risks."

In order to determine whether imposing liability under this theory for a shipper of hazardous materials was appropriate, the court in Indiana Harbor next examined the circumstances of the case in light of the Restatement factors. The court pointed out that a railroad network is a hub and spoke system and the hubs are in metropolitan areas. It is unlikely that chemicals can be rerouted around all metropolitan aras in the country except at prohibitive cost. Even if it would be feasible to reroute them, a carrier, rather than a shipper, would be better situated to do the rerouting. In any event, according to the court, rerouting is no panacea because it will often increase the length of the journey or compel the use of a poorer track, or both. This in turn increases the probability of an accident and perhaps even the consequences of an accident. After considering these and other factors, the court in Indiana Harbor ultimately concluded that this was not an apt case for strict liability.

Courts have imposed strict liability for a variety of different environmental activities. Recently, a Florida appellate court held that fumigation is an ultrahazardous activity for which a fumigation company may be held strictly liable, regardless of any alleged negligence by a third party. In that case, the defendant fumigated two evacuated condominium buildings, but fumes entered a third building through a supposedly impenetrable fire wall. Residents in the third building were injured when they inhaled the fumes, and they sued the fumigator. The court held that because its conduct was an ultrahazradous activity, negligence by third parties (the architect and contractors who allegedly failed to construct a proper fire wall), would not permit the fumigator to avoid liability.[1]

Review the facts in Jersey City Redevelopment Authority v. PPG Industries set out in the Negligence section of this chapter. You may recall that there were several different theories under which the plaintiff argued it was entitled to recover damages from the defendants in that case. The portion of the court's opinion as to the plaintiff's strict liability theory is set out below.

Jersey City Redevelopment Authority v. PPG Industries
18 ELR 20367 (D.N.J. Sept. 3, 1987)

[Claim for Strict Liability against] PPG and Lawrence/Clif

The court imposes strict liability upon PPG and Lawrence/Clif for engaging in the abnormally dangerous activity of distributing hazardous substances.

The court's conclusion is based on its application of the standards set forth in the Restatement (Second) of Torts sec. 520, as adopted by the New Jersey Supreme Court in Department of Environmental Protection v. Ventron, 94 N.J. 473 (1983). First, it is undisputed that the chromium in the concentrations found constituted a hazardous waste posing a high degree of risk to the environment and a potential although lesser risk to individuals. Second, there is a likelihood that the harm to the environment could be great, particularly if it migrated and entered either ground water or the drinking water supply. Third, the risk could not be eliminated by others subjected to it through the exercise of reasonable care, and only those with specialized knowledge of the risks and of the chromium's existence could protect against it. Fourth, the activity of both defendants was inappropriate to the place where it was carried on--it was foreseeable for both PPG and for Lawrence/Clif to anticipate the utilization of said fill in residential areas. Finally, although the fill served some limited utilitarian purpose, its limited value is far outweighed by its dangerous attributes and the risks that it posed to the environment. Therefore, the court concludes that the distribution of the chromium residue was abnormally dangerous, and that these defendants are strictly liable as a result.

Questions and Comments for Discussion

1. What are the implications for industry if strict liability is imposed on an activity like fumigation? Who ultimately bears the cost of that increased liability? What are the economic and social implications of a court's decision to impose strict liability on a particular activity?

2. In a portion of the Jersey City case not reprinted, the Court addressed PPG's argument that it could not be strictly liable because its generation and distribution of the chromium waste was not a proximate cause of plaintiff's injuries. The court rejected the defendant's argument, stating: "First, it was foreseeable to PPG when it conveyed Garfield Avenue to Lawrence/Clif that Lawrence would sell chromium-contaminated landfill to other parties. Second, PPG's liability is not relieved by the actions of any intervening parties. As stated, Lawrence/Clif's sale of fill to Ambrosios, though ten years later, was foreseeable. Lawrence's negligence in distributing the fill with its independently gained knowledge of the environmental risks does not relieve PPG of its responsibility. A party engaging in an abnormally dangerous activity should not benefit from the fortuitous negligence of an intervening actor. Additionally, Ambrosio's transportation of the fill to Ninth Street, without knowledge of its chromium content,

does not break the cause chain between PPG's actions and plaintiff's injury."

As this statement suggests, the question whether an "intervening cause" should relieve a defendant of liability under a tort theory is generally a question of proximate cause. As the court indicated, the general rule is that a foreseeable intervening cause will not eliminate liability. Can you think of some examples where an intervening cause would be unforeseeable, and thus relieve a defendant of liability because his activity did not proximately cause the harm to plaintiff?

3. Keep in mind that even if a court does not impose strict liability upon a defendant's activity, the defendant may still be liable under other theories like negligence, trespass and nuisance, or other tort or contract law theories. In addition, state and federal statutes may entitle a plaintiff to seek reimbursement of costs of cleaning up a contaminated site. In Jersey City, for example, the court held that plaintiff was a responsible party under CERCLA, and that CERCLA grants the court the authority to allocate response costs among liable parties using equitable factors as the court determines appropraite. The court, comparing the fault of the plaintiff and defendant, allocated damages equally between Lawrence/Clif and PPG. Even though the plaintiff was a responsible party under the law, the court believed it would be inequitable to diminish plaintiff's recovery under the circumstances, stating "imposition of CERCLA strict liability upon an unknowing landowner is unnecessary and unfair where knowing generators and distributors are available." CERCLA liability is discussed in Chapter 51.

A NOTE ABOUT CERCLA LIABILITY

CERCLA, (which stands for the Comprehensive Environmental Response, Compensation, and Liability Act), also known as the "superfund" law, was enacted in 1980 and revised in 1986. It has four basic elements.

1. It creates an information-gathering and analysis system to enable governments to develop priorities for cleaning up chemical dump sites and a priority list for cleaning up contaminated sites. (National Contingency Plan or NCP and National Priorities List or NPL).

2. It gives the federal government authority to respond to hazardous substance emergencies and to clean up leaking sites.

3. It creates a Hazardous Substances Trust Fund ("superfund") which was raised to $8.5 billion following the 1986 amendments.

4. The Law makes persons who are potentially responsible persons under the act liable for cleanup and restitution costs. The law imposes strict liability, liability is joint and several, and retroactive. Thus a person may be responsible for the costs of cleaning up a site even though the site was contaminated prior to passage of the law. (The law does, however, provide for the right of contribution based on "equitable factors as the court determines are appropriate.")

Potentially responsible parties under CERCLA include:

1. current owners and operators of the site
2. past owners and operators of the site during the time of disposal
3. persons who arranged for disposal or treatment
4. persons who accepted substances for transport to disposal or treatment facilities.

In CERCLA jargon, these include (1) owners and operators (2) former owners and operators, (3) generators or arrangers, and (4) transporters.

There are few defenses to CERCLA liability. These include an act of God; an act of war; or an act or omission of a third party if the defendant exercised due care (the "third party defense.")

1. Old Island Fumigation Inc. v. Barbee, Fla. Dist. Ct. App. 3d Dist. 7 Toxics Law Reporter 500 (9/1/92).

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Negligent Hiring
Guillermos v. Brennan, 691 F. Supp. 1151 (1988)

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About May 1984 Mark hired Brennan to work as an insulation installer for City Wide. That hiring took place without any investigation of whether Brennan had a criminal record or of his past driving record (except for verifying that he had a valid current license), nor did Mark communicate with Brennan's prior employers. Guillermos* say (and the court accepts) that such inquires would have revealed that:

1. Brennan had three convictions for felony burglary charges and one on misdemeanor battery charges;
2. Brennan had held his three most recent jobs for periods of less than one year each.
3. Brennan's driver's license had been suspended by the State of Wisconsin in 1974 due to a "damage judgment" and it had not been reinstated for more than seven years.

On March 11, 1985, Brennan, though intoxicated at the time, was driving a City-Wide owned vehicle in Aurora, Illinois. It is not contested that Brennan collided with the vehicle carrying Cynthia. Two days later Cynthia died, apparently from injuries resulting from the accident.

Guillermos originally brought suit in an Illinois state court against Brennan, City Wide, and the owners of the tavern at which Brennan had been drinking. Brennan was sued on negligence grounds, City Wide on a respondeat superior theory and the tavern owners under the Illinois Dram Shop Act.

After Guillermos had twice amended their Complaint, City Wide moved for summary judgment.

Guillermos asserts defendant was negligent both in hiring Brennan and in sending him off to Illinois in a company vehicle.

Should the Court grant the motion for summary judgment?

*Parents of Cynthia, and plaintiffs in this action.

Problem: Formation of Contract

Appellant Allied Disposal:

Appellee Bob's Home Service:

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Plaintiff, Allied Disposal Inc., appeals from an order of the trial court dismissing with prejudice its three count petition. Count I sought money damages against defendant Bob's Home Service Inc. for breach of contract. Count II sought actual and punitive damages against defendants Chem-Dyne Corporation and the Zykans for tortious interference with the contract between plaintiff and Bob's. Count III sought injunctive relief against all defendants to prevent their interference with plaintiff's exercise of its rights under the contract. We reverse and remand.

The contract upon which the litigation was based dealt with land owned by Bob's. This land, the Muenz site, was a waste disposal site which was authorized by the State of Missouri for disposal of chemical wastes. Plaintiff is engaged in the business of waste and trash disposal, including disposal of chemical waste. On March 25, 1977, Allied and Bob's entered into an agreement which provided:

(1) Allied would have ingress and egress to the Muenz site on routes reasonably selected by Bob's.

(2) Allied would be the exclusive user, agent and broker of the site except for the use by Bob's to service its current customers and certain identified potential customers. No use of the site could be made by any other person or business without Allied's written consent.

(3) Allied would use only the Muenz site for disposal of chemical waste it hauls and would not use any other site without the written permission of Bob's.

(4) The parties would use their best efforts to obtain necessary state permits for each type of waste to be disposed of on the site and would use the same efforts to obtain federal permits if necessary.

(5) Allied would reimburse Bob's for any loss suffered because of waste brought to the site in violation of state permit or which was mislabeled.

(6) Each party would be responsible for adhering to the State rules pertaining to its phase of the operation.

(7) "The price that 'Allied' shall pay 'Bob's' for the use of the site shall be mutually agreed upon by the parties for each contract of hauling that 'Allied' has."

(8) Allied would pay for any increase in costs of operating the site resulting from changes in the rules of the State even after the price had been determined by the parties unless waived by Bob's.

(9) The parties would make available their records and would account to each other.

(10) Allied would use the site as allowed by the State for disposal, temporary or permanent, of waste resulting from industrial or traffic accidents and acts of God at a price to be "as mutually agreed upon by the parties."

(11) The contract would be for a term of three years with automatic renewal for one year unless notice of election not to renew was given 6 months prior to the expiration date.

(12) Payments for each month would be made by Allied within 15 days of billing

which was to be done on the first of each month for the preceding month's service.

(13) Each party gave the other the "right of first refusal" to purchase respectively the business of Allied or the site of Bob's. Any other purchaser of either was bound by the terms of the contract.

(14) "Both parties agree that an equity court may be used to enforce any and all parts of this agreement."

Contemporaneously with the execution of this contract the principals of the two contracting parties entered into an agreement in which they agreed (among other things) not to directly or indirectly compete with the contracting corporations.

Plaintiff alleged that it duly performed its obligations but that after October 13, 1977, defendant breached the agreement by not allowing plaintiff access to the site and by authorizing Chem-Dyne to assume control of the site and by permitting Chem-Dyne to use the site in competition with plaintiff resulting in damage to plaintiff. Count II alleged that defendants Chem-Dyne and Zykan, with knowledge of the contract, induced Bob's to repudiate and cancel the contract with plaintiff and to enter into a contract with Chem-Dyne to plaintiff's injury. Count III set forth allegations of its injuries supportive of injunctive relief. That count includes an allegation that fees for the use of the site "were invoiced monthly and paid regularly by plaintiff."

[1] In ruling on a motion to dismiss both we and the trial court must accept as true all well pleaded facts and the reasonable inferences favorable to the pleader to be drawn therefrom. If those facts and those inferences evidence the existence of any cause of action, the petition should not be dismissed. *Shapiro v. Columbia Union Nat. Bnk. & Tr. Co.*, 576 S.W.2d 310 (Mo. banc 1979) [1]; *State ex rel. Sisters of St. Mary v. Campbell*, 511 S.W.2d 141 (Mo.App.1974) [1, 2]. We review this case on that basis.

Defendants' motions are based upon the contention that the provision numbered (7) *supra*, is vague and indefinite rendering the agreement nugatory. It is contended that the provision is an agreement to agree on the price and, therefore, an essential element of the contract has not been agreed upon. The dismissal of all counts was apparently based upon the trial court's conclusion that the contract was invalid or nonexistent for that reason. This was the only basis set forth in the motions to dismiss and in the brief of respondents here. We find no other basis for the dismissal.

Problems in Introduction to Contracts

1. John and Mike entered into a contract for the sale of computer equipment. John, the seller, also agreed to service the equipment for two years under the contract. The sale price of the computer was $10,000 and the value of the service contract was $7,500. In a breach of contract action, which law will apply, the UCC or common law? Explain.

2. Laura promised her roommate Betsy that she (Laura) would "take care" of getting renter's insurance on their apartment. Two months later, when the apartment was broken into and looted, Betsy discovered that Laura had not purchased the insurance. Is there any theory under which Betsy might be able to recover damages from Laura in this case? Explain.

3. Studly Student interviewed for a job as assistant manager of Burger Doodle. During the interview, he told the manager about an idea he had for a Burger Doodle campaign. Steve didn't get the job, and is angry when, six months later, Burger Doodle began an ad campaign virtually identical to the one he suggested. If he sues Burger Doodle for breach of implied contract, should he win? Discuss.

4. Ed went to New York Hair Design to get a trendy new hairstyle. A stylist there cut Ed's hair in a new wave style and applied permanent wave lotion, manufactured by Bizzaro Products. The lotion caused Ed's hair to fall out, and Ed sued New York Design for damages for breach of implied warranty under the Uniform Commercial Code. New York moves to dismiss on the ground that the UCC does not apply in this case. Is New York correct?

Problems in Contract Offers

1. Shelly offered to sell her stereo to her friend Danny. Shelly stipulated in her offer that if Danny wanted to buy the stereo, he had to send a Valentine's Card on Valentine's Day containing his written acceptance. On Valentine's Day, Danny telephoned Shelly and said he accepted her offer to sell the stereo, but that he had forgotten to send the card. Is there a contract? Explain.

2. Mr. Ed's grocery offered a contest to customers. If the customer purchased $10.00 worth of groceries a week for 10 weeks, and had a special card stamped as proof, the customer would receive a free canned ham. Lilly purchased groceries each week at Mr. Ed's, and was irate when Ed decided to change the contest five weeks later because the price of ham had sky-rocketed, and offered instead frozen turkeys. If Lilly sues Mr. Ed's to enforce the contract, is she entitled to a ham? Why or why not?

3. Charley mailed an offer to Pete to purchase Pete's condominium in Florida. Before Pete accepted the offer, a hurricane hit the Florida coast and destroyed the condominium. Neither Charley or Pete knew the condominium had been destroyed when Pete accepted Charley's offer. Is there a contract? Discuss.

4. Over a period of several months, ABC Manufacturing Company and XYZ Plumbing Supply have been negotiating over the sale of copper tubing. They have reached an agreement in every aspect expect the price of the tubing. ABC ships the tubing to XYZ, but XYZ refuses to accept delivery. ABC files suit against XYZ for breach of contract. Is there a contract under these circumstances? Explain.

5. On October 4, 1985, Honest Bob's Motors ran an ad in the local newspaper which read: "We're bananas over the new Renault Fuego! The first customer to bring us 2 tons of bananas within the next 5 days will get a fully equipped new Fuego." Randall Toot, owner of Toot's Fruits, sees the ad and buys 2 tons of bananas from a wholesale fruit supplier and has them shipped to Bob's the next day. When Toot attempts to pick up his Fuego, Honest Bob's refuses to go through with the deal. Toot sues, and Bob's attorney argues, among other things, that the ad was not an offer. Is he correct?

Problem: Acceptance of Offers
"What Terms Are Included in the Contract?"

32

WHARTON BUSINESS SIMULATIONS

Holland needed a crane to move some heavy equipment. Holland contacted Belger, and Belger sent a crane, a boom, and two employees to the job site. A work order was signed (whether it was signed before or after the accident is disputed). In small print on the reverse of the work order were the following provisions:

> It is further agreed and understood that any work performed on such premises is performed at the sole risk of the lessee. With regard to such equipment or delivery or work performed, Belger Cartage Service, Inc. is hereby relieved form any and all responsibility regardless of its own fault or negligence.

The two employees sent by Belger with the crane and boom operated the equipment at all times, with employees of Holland on the ground operating tag lines. When a conveyor was being lifted, the cable on the boom broke and the conveyor fell. The conveyor as well as the crane and boom were damaged. The only evidence as to the precise cause of the accident was that the conveyor was lifted at an improper angle in relation to the boom. As a result, the cable rubbed the side of the pulley, frayed, and broke.

Belger contended that its employees became Holland's employees by virtue of the circumstances and the quoted provisions of the work order, and that Holland was therefore responsible for their negligence. Holland contented that the terms were never communicated as part of the contract and that Belger was liable for the damage to Holland's conveyor. The trial court ruled in Holland's favor, and Belger appealed.

Problems in Contract Acceptance

1. Larry, an architect, submitted a standard form offer to Sunbelt, Inc., a developer of retirement communities, for architectural services in connection with a new project planned by Sunbelt. Sunbelt sent back its own standard form acceptance. Although the parties' forms agreed on many points, there were significant points of disagreement including the fact Larry's form contract called for arbitration of all disputes. Neither party closely read the other's form. One day after receiving Sunbelt's acceptance, Larry changed his mind and notified Sunbelt that he did not consider himself contractually bound by the agreement. Is Larry correct?

2. Barry, an building supplier, submitted a standard form offer to Sunbelt, Inc., a developer of retirement communities, to supply lumber in connection with a new project planned by Sunbelt. Sunbelt sent back its own standard form acceptance. Although the parties' forms agreed on many points, there were significant points of disagreement including the fact Barry's form contract called for arbitration of all disputes. Neither party closely read the other's form. One day after receiving Sunbelt's acceptance, Barry changed his mind and notified Sunbelt that he did not consider himself contractually bound by the agreement. Is Barry correct?

3. ABC Corp. and XYZ Corp. had been negotiating for several weeks for the sale of certain ABC-owned assets and equipment. During the third week, ABC and XYZ reached a tentative agreement. ABC's negotiator said, "It sounds good to me, but I want to see how it looks in writing." XYZ's lawyers drafted the proposed contract and submitted it to ABC, but ABC backed out of the deal completely. If XYZ sues ABC for breach of contract, was there a contract? Why or why not?

4. Moe sent Walter an offer to purchase Walter's trailer park for $10,000. The offer stated: "Your failure to reject this offer within two weeks will be considered an acceptance of all of its terms." Walter received the offer but failed to respond to it in any way. Is there a contract under these circumstances?

5. Cape Cod Sail Loft sent Lance Sturdy, noted yachtsman, a letter offering to furnish Lance's entire sail inventory for the upcoming sailing season for $25,000. Cape Cod's letter provides that Lance must accept by certified mail and "no contract will result until we receive your acceptance as specified." On April 1, 1995, Cape Code, disturbed by its rising labor costs, sent a telegraph to Lance revoking its offer and stating a new price of $28,000. Lance received the telegram ten minutes after mailing a letter of acceptance to Cape Code by regular mail. When Cape Code refuses to apply the sails for $25,000, Lance files suit. Should he win?

6. Acme Widget Supply placed a "rush" order for 1,000 widgets with the Widget Warehouse. Warehouse responded by promptly sipping the widgets. Two hours after shipping the widgets, Warehouse got a telephone call from Acme attempting to cancel the order. Acme refuses to accept the goods and Warehouse files suit for breach of contract. The trial court ruled in Acme's favor on the ground that Widget failed to formally accept Acme's offer by promising to ship the goods. Is the trial court's decision correct?

Class Problem: Formation of Contracts under the UCC
Entrusting Goods under UCC 2-403(3)

34

This appeal concerns a replevin order[1] entered against defendant Karon Markland, directing the return of sterling silver owned by the plaintiffs and sold to Markland by Land of Lincoln Goodwill Industries, Inc.. Markland and Goodwill contend that the trial court erred in characterizing the silver as lost property when the evidence established that Toby Kahr entrusted the silver to Goodwill pursuant to §2-403(3) of the Uniform Commercial Code. Markland urges she received good title to the silver from Goodwill and is the true owner of the silver against the plaintiffs.

Rita Kahr testified at trial how the silver was mistakenly included with the donation for Goodwill. She stated that the silver was put into bags to be put in her attic along with jewelry and credit cards when she and Toby went on vacation. After returning from vacation, the bags of valuables were put on the dining room table with sacks of clothes for Goodwill. When Toby took the bags of clothes to Goodwill, he mistakenly picked up the bags containing the silver. Approximately two hours after Toby returned from Goodwill, Rita asked where the silver was and then Rita and Toby realized it was taken to Goodwill. That same day, Toby called Goodwill and was told the pieces had been sold. Rita stated the silver was a wedding present 27 years previous from her father. Rita stated that no one told the Goodwill employees not to sell the silver but her husband did tell Goodwill the donation was clothing only.

Judy Taylor, the Goodwill employee who received the plaintiffs' donations in April 1983, testified that she priced the silver after it was discovered and knew it was a bit nicer than other silver received by Goodwill. Taylor stated she discovered a wallet among the clothing after Toby left the store and called someone at the plaintiffs' homes about the wallet. She did not mention the silver in the phone conversation because she had not yet discovered the silver. Taylor did not recall Toby stating the donation was clothing but remembered he did not want a receipt for the donation. According to Taylor, Toby became irate when he called concerning the items. Taylor stated she had no conversation with Markland regarding the silver. Taylor testified it was not uncommon for Goodwill to receive nice things in donations but she did not recognize the silver to be sterling.

Taylor testified in her deposition that Markland shopped at Goodwill almost everyday and on April 5 bought the silver within five minutes after it was received. Should plaintiffs be entitled to recover the goods?

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[1] An order to return goods.

Acceptance, Formation of Contract Under UCC

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1. Hall's Inc., a variety shore in Pittsburgh, ordered a quantity of electric hairdryers from Excon Corporation in Miami. The goods were to be shipped "F.O.B. Miami." Excon delivered the goods to the carrier, but they were destroyed on their way to Pittsburgh. Absent a specific agreement by the parties, who bears the risk of loss? Who has title to the goods?

2. On 1/1/88, T mailed S an Offer to sell a Condo for $120,000;
On 1/5/88 at 10:00 a.m., T removed the offer by telegram:
On 1/5/88 at 10:10 a.m., S accepted by telegram;
On 1/5/88 at 11:00 a.m., S received T's revocation;
On 1/5/88 at 11:10 a.m., T received S's acceptance.

   What result under traditional common law?
   What result under the Modern Restatement and UCC?
   What result if the offer had stipulated acceptance by mail?

3. Sam Higgonbottom sold his Mercedes-Benz to Katrina Walters in exchange for a check for $13,500 made out to Walters and indorsed to him. He gave her the title to the vehicle indorsed over to her. Walters transferred ownership of the car, together with the title papers, to Benzel-Busch, which in turn sold it to A-Leet. Higgonbottom later discovered that the check given to him was originally issued in the sum of $13.50 and had been fraudulently changed by Walters. Neither Benzel-Busch nor A-Leet was aware of the fraud. If Higgonbottom sues A-Leet to recover possession of the car, what result and why?

4. GE Co. delivered a stock of large lamps to P & S Supply Company as "agent to sell or distribute such lamps." Under the contract, P & S could sell the lamps directly or deliver lamps under contracts of sale between GE and its purchasers. About 20 percent of P & S sales were direct sales to its own customers; P & S was also a wholesale supplier of other electrical supplies. The lamps were its only consignment business.
   P & S had financial difficulties and subsequently entered into an assignment for the benefit of its creditors. Who claimed the stock of GE lamps? GE claimed that the lamps were its property under its principal-agency relationship with P & S. Who is entitled to the lamps?

Lack of Mutuality of Promise and Promissory Estoppel

For Appellant Sanders:

For Appellee Arkansas Missouri Power Company:

The appellant was seriously injured when he came in contact with a "hot" electric line while working as a lineman for the appellee. In his complaint the appellant alleged the appellee's agents promised he would receive full pay and benefits until he could return to work in exchange for his promise to return to work when able. He further alleged that in reliance on the appellee's promise and their performance of it for some eighteen months he built a new home with special wheelchair accommodations. In addition he alleged he was entitled to recover on theories of gift and contract implied in fact. These were alleged as alternative theories to his allegation of breach of the express agreement. In his prayer for relief, the appellant alleged he was totally and permanently disabled and thus was entitled to $675,000, presumably the present value of payments he could expect to receive from the appellee for the remainder of his "working life."

The circuit court sustained a demurrer and dismissed the complaint. The findings stated in the dismissal order were:

> 1. The Workers' Compensation Act or claim is not plaintiff's exclusive remedy and therefore not a bar to this action.
>
> 2. The allegations of the Complaint do not establish valid consideration for a binding or enforceable contract; said allegations do not establish a third party beneficiary relationship; nor do they constitute a valid enforceable gift.
>
> 3. Plaintiff's Complaint, therefore, does not state facts sufficient to constitute a cause of action; therefore, Defendant's Demurrer and Motion To Dismiss should be granted.

Although there had been some discovery activity which became part of the record in this case, the court's order clearly was based on the inadequacy of the complaint, and we limit our decision to the propriety of that order.

L201/L203
Powell

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Problems in Consideration

Problem Solving Technique for Consideration Problems:

1. Ask "What is the promise at issue?" (This is the promise made by the party seeking to avoid performance of the agreement.)
2. Ask "Who is the promisee?" (Party to whom the promise was made.)
3. Ask: Has the promisee given consideration? (Something of legal value, bargained for and given in exchange for an act or a promise.)

1. Ace Painting Co. agreed to paint Smith's house for $2,000 payable upon completion. Ace subsequently refused to honor the agreement, having received a more lucrative contract. Smith files suit for breach of contract. Is there consideration supporting this agreement? What if Smith decides to cancel the contract because he later received a lower offer to paint his house? Can Ace enforce Smith's promise?

2. Dr. Brown entered into a contract to sell his practice to Dr. Johnson. Brown later changed his mind and asked to be released from the contract. Johnson agreed to release Brown in exchange for $40,000, to be paid at a future date. Later, Brown filed suit for a declaratory judgment that he was not bound by his promise to pay Johnson $40,000 on the theory that his promise was not supported by consideration. Was Johnson's cancellation of the contract consideration?

3. Jessee, a carpenter, orally agreed to do the interior finish work on a store owned by Smith. The price of his services was agreed to be "cost plus 25 percent." Jessee finished the work and submitted a bill for 125 percent of the cost of materials, claiming that he had told Smith's manager that Smith would have to pay for the materials used and in addition that amount plus 25 percent for his labor. Witnesses knowledgeable in the building trade testified that a "cost plus 10 percent" contract meant a labor charge of 110 percent of the materials cost and that a "cost plus 25 percent" contract was reasonable for interior finish work. The trial court ruled that the contract was unenforceable because the labor charge was exorbitant. Jessee appealed. What result and why?

L201 Powell
Reality of Consent

38

I. Problems in Misrepresentation:

1. A, while negotiating with B for the sale of A's race horse, tells B that the horse has run a mile in a specified time. A is honestly mistaken, and unknown to him, the horse has never come close to that time. B is induced by A's assertion to make the contract to buy the horse. B sues to rescind the contract when he discovers the true facts. What result and why?

2. A, seeking to induce B to make a contract to buy a tract of land at a price of $1,000 an acre, tells B that the tract contains 100 acres. A knows that it contains only 95 acres. B is induced by the statement to make the contract. B sues to rescind the contract when he discovers the true facts. What result and why?

3. A, seeking to induce B to make a contract to buy land, tells B that the land is free from liens or encumbrances. Unknown to either A or B, C holds a recorded mortgage on the land. B could easily learn this by walking across the street to the register of deeds in the courthouse but does not do so. B is induced by A's statement to make the contract. B sues to rescind the contract when he discovers the true facts. What result and why?

4. A, seeking to induce B to make a contract to buy land, fails to disclose that the water on the property is not potable (safe for drinking.) B never asks about the condition of the water, nor does B request any tests of the water prior to purchase. B later sues to rescind the contract when he discovers the true facts. What result and why?

II. Mistake of Fact

1. A contracts to sell and B to buy a tract of land, the value of which has depended mainly on the timber on it. Both A and B believe that the timber is still there, but in fact it has been destroyed by fire. B sues to rescind the contract when he discovers the true facts. What result and why?

2. A writes B offering to sell for $100,000 a tract of land that A owns, known as "201 Lincoln Street." B, who mistakenly believes that this description includes an additional tract of land worth $30,000, accepts A's offer. B sues to rescind the contract when he discovers the true facts. What result and why?

III. Duress and Undue Influence

1. A, who has promised B to vacate leased premises in return for $10,000 in order to permit B to demolish the building and construct another, refuses to do so unless B agrees to purchase his worthless furniture for $5,000. B can resort to regular eviction proceedings, but this will materially delay his construction schedule and cause him financial loss so he agrees. B pays but later sues to recover his $5,000. What result and why?

2. B, an elderly and illiterate man, lives with and depends for his support on A, his nephew. A tells B that he will not longer support him unless B makes a contract to sell A a tract of land. B is thereby induced to make the contract. Later, B sues to rescind the contract. What result and why?

Enforcement of Exculpatory Clauses

For Appellants Hall:

For Appellee Garden Services:

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Plaintiffs Joyce and Hulan Hall were vacationing at Callaway Gardens. Joyce decided to go horseback riding. Arrangements were made through the hotel. Joyce asked whether the horses "walked" or "ran" and was assured they "walked" and "it was safe for children over three years of age."

Joyce and her five-year-old daughter went to the location designated, and she was asked to sign a "Release of Liability." There was only one sheet for all riders to sign. It stated, in part: "I (we), the undersigned, am hiring your horse (horses) to ride today and all future rides at my own risk, which I voluntarily assume. In consideration of the modest fee charged and paid by me, I (we), the undersigned, hereby release Gardens Services, Inc., and its employees and agree to hold it and them harmless from any and all liability, claims, damages, actions and causes of action whatsoever, for loss, damage, or injury to person . . . irrespective of how arising, and however caused including but not limited to all kinds and degrees or extent of negligency [sic] (except willful or wanton negligence or misconduct), which Gardens Services, Inc. may commit or be charged with ... in connection, directly or indirectly, with the riding . . . or using of your horse (horses) . . . ." All riders were told they could not ride if they did not sign. Joyce said she briefly read it, but they were rushing you to get on the horses." Joyce asked one of the guides if the horses "walked" and was again told that they "walked." Joyce and her daughter rode on the same horse.

After the ride began, their horse "kept going off the trail into the woods" and she asked the guide why it did this, and was told "it didn't want to get its feet muddy." There were muddy places on the trail. They had been on the trail for about 35 minutes when her horse left the trail and started running through the woods. She pulled back on the reins but the horse would not stop. Joyce and her daughter fell from the horse when struck by tree branches. They fell on the steep side of a slope and Joyce slid back down to the trail. She alleges she was injured as a result of the fall and brought this action for damages. Her husband joined in the suit with a claim for medical expenses and loss of consortium. The trial granted defendant's motion for summary judgment, and plaintiffs bring this appeal.

Problems in Illegality

1. Dan was hired by a local insurance agency to act as an agent for the firm for three years. The contract contained a covenant not to compete against the company, which provided that in the event Dan left, he could not sell insurance for any company any where in the United States for three years. Is this covenant enforceable? Discuss.

2. "Happy Farms" Commune hired Farmer Brown to plow ten acres of land for $1,000. Farmer Brown did so, but did not know that the Commune subsequently planted marijuana in the fields. Growing marijuana is illegal in that state, and Commune members were subsequently prosecuted under the criminal law. If Farmer Brown sues to recover the $1,000 promised under the contract, will he be successful?

3. Abe contracts to work for Buz, an unlicensed building contractor. A statute requires the licensing of building contractors and contains various tests of fitness and character. Abe works for one month for Buz, is not paid, and than find outs that Buz is unlicensed. If Abe sues Buz to recover his unpaid wages, should he recover? Why or why not?

4. Morris sold Bea a new car on an installment basis. Two weeks later, Bea used the car as a getaway in a bank robbery. She was arrested and defaulted on her car payments. Morris sued her, and she defended on the ground that the contract was illegal because it was used in the commission of a crime. Is she correct? Explain.

5. Amy, a 20 year old college student, went to High Note, a large store specializing in electronics, to buy a stereo. Without shopping at any other store, Amy signed a contract to "rent to own" a stereo for $20 per week for 50 weeks, with a down payment of $200. The next week, she saw the same stereo for $350 for sale in another store. She wants to cancel her contract with High Note on the grounds of unconscionability. Discuss whether the contract is likely to be found unconscionable.

Problem in Contract Performance

Problem

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Facts: In late March 1991, Alan Pei made a written offer to buy real estate owned by Emily Belushi. The offer was communicated to Pei at a conference in which both Pei and Belushi's real estate agents were present. The offer proposed that Pei would buy the property on contract, taking possession of it in September 1991 and paying the purchase price of $125,000 to Belushi over a 10-year period. Because Belushi did not know Pei and was concerned about Pei's creditworthiness, at the suggestion of Pei's agent a clause stating that the contract was "subject to seller's approving buyer's credit report" was inserted in the contract before Belushi signed it.

Pei furnished Belushi with a credit report and a personal financial statement. Belushi told Pei's real estate agent that the report "looks real good" and that she would have her attorney review it and begin the title work on the property. During the next six weeks, Belushi met with Pei three times to discuss the pending sale. During these meetings, Belushi requested additional financial information. Belushi also attempted to negotiate for a higher interest rate and purchase price. In May 1991, Belushi informed Pei that she rejected Pei's credit rating. Pei later brought suit to enforce the contract. The trial court held for Pei, and Belushi appealed.

For Appellant Belushi:

For Appellee Pei:

Problems in Contract Performance

1. Millers hired Courtney to build a house on their property. The contract price was $150,000. Courtney failed to install adequate fixtures in the house and it cost Millers $1500 to cure the defect. Millers refused to pay the contract price to Courtney, and he sued. What standard of performance will the courts apply in this case? What result is likely and why?

2. Sam and Dave entered into a contract for the sale of Sam's land. The closing was scheduled for June 1, 1994. On April 15, Dave learned that Sam had sold the land to someone else. May Dave sue immediately for breach? Why or why not?

3. Bus Service entered into a contract with MRC, a bus manufacturer, to purchase ten new buses. One week before delivery, MRC notified Bus Service that its manufacturing plant had been destroyed when an employee negligently set fire to some paper in the trash bin. As a result, all its buses were destroyed. It will take Bus Service at least a year to manufacture new buses. Can Bus Service successfully sue MRC for breach of contract? Why or why not?

4. ABC entered into a contract to build an office building for Two & Two, certified public accountants. The contract contained a clause conditioning payment on ABC's procurement of an architect's certificate from Boomer, a local architect. ABC completed the construction, but Booter had moved to Belize and could not inspect the building. Is ABC entitled to enforce the contract under these facts? Explain.

5. Midge agreed to supply 150 cheesecakes to Just Desserts, a gourmet food store that planned to freeze the cakes and sell them. The contract provided that the cakes were to be delivered by 5:00 p.m. December 15 and that "time is of the essence." What is the significance of these words in the contract?

6. C&G entered into a contract to sell goods to Weedworks, a craft store. After contracting, C&G learned that the cost of its raw material required for the contract had risen by 20% and it could not perform the contract without incurring a loss. Reggie Van Gleeson, president of C&G, had a sudden heart attack and died when he heart the news. C&G then notified weedworks that it was repudiating the contract. If sued, can C&G successfully defend using commercial impracticability and impossibility under these facts?

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Performance of Sales Contract under the UCC:

Assume: A-1 Skates is a company located in Wilmington, Delaware, that manufacturers roller skates. B is a retail sporting goods store called "Skates R Us" located in Bloomington, Indiana. B places an order to purchase 100 pairs of roller skates (called "Hi Fliers") in various sizes from A-1 Skates at a wholesale price of $11.95 per pair.

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I. Seller's obligations and Risk of Loss under the UCC:

1. If the skates are to be shipped "FOB Wilmington, DC," and the skates are stolen from the delivery truck in transit, who bears the risk of loss of the skates? If the skates are to be shipped "FOB Bloomington, IN," what result? If A-1 had shipped 100 pairs of "roller ball" skates instead of "Hi Fliers," and the skates are lost in transit, who bears the risk of loss of the skates?

2. If the contract is silent as to place of delivery, where are the goods to be delivered?

II. Buyer obligations under the UCC:

1. Assume the skates arrive by delivery truck at "Skates R Us" in Bloomington, IN. If the contract is silent as to time for payment, when is "Skates R Us" obligated to pay for the skates? Barney Buyer, "Skates" manager, wants to inspect the delivery to make sure the skates are what he ordered. Can Barney inspect <u>before</u> he pays for the goods?

2. What if Barney inspects the delivery, and discovers that the Seller has sent 100 pairs of "roller ball" skates instead of "Hi Fliers." Must Barney accept the shipment of "Hi Fliers?"

3. A-1 Skates, upon learning of their mistake, notifies Barney that they will promptly ship 100 pairs of "Hi-Fliers." Must Barney accept the shipment of "Hi Fliers?"

4. Barney now has 100 pairs of "roller ball" skates sitting in his back storage room. What are Barney's obligations regarding the "roller ball" skates?

5. Assume that Barney is busy the day the "roller ball" skates are delivered, and he doesn't inspect the shipment. Later, Barney discovers that A-1 shipped the wrong skates. What can Barney do? What if Barney had received a call from A-1 the day the shipment arrived, indicating there had been some mistake in the order and that A-1 would correct the mistake?

6. Barney finally received a shipment of "Hi Fliers," and immediately sold 78 pairs to the local public who were clamoring for the latest in skating excellence. Two weeks later, a number of people began to return the skates to Barney because the back wheel of the skates tended to fly off, with the result that the skater himself became a "Hi Flier." Can Barney revoke his acceptance of the shipment at this late date?

Class Problem: Strict Liability for a Defective Product

Curtis Hagans lost the ring finger of his left hand while operating an industrial table saw manufactured by the Oliver Machinery Company. The accident occurred while he was feeding a board into the saw by pushing the board forward with his right hand and placing his left hand atop the board to steady it. The saw's circular blade hit a knot in the board, causing the board to jerk up abruptly. Then, as the board rapidly moved forward and descended, Hagan's left hand fell onto the circular blade. There was no claim that Hagan's own carelessness contributed to his injury.

When manufactured by Oliver, the saw was equipped with a blade guard assembly and an "antikickback" device that would have prevented Hagan's injuries. These safety devices, however, were designed to be removable because the prevented the saw from performing many common woodworking functions. They were not attached to the saw when Hagans was injured.

Hagans sued Oliver in federal court under section 402A, alleging Oliver's defective design of the saw and its failure to warn of the risks posed by its defective design. The jury returned a verdict in his favor. Oliver appealed the trial judge's denial of its motions for a directed verdict and for judgment notwithstanding the verdict. Should the court reverse the jury's verdict in this case?

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Problems in Product Liability

1. Janet went into Friendly Pharmacy to purchase hair coloring. She wasn't sure which product she should buy, so she found a sales clerk and told the clerk that she was looking for a product which would lighten her hair. The clerk said, "You should use Hair Affair--it's wonderful. You can use it on your eyebrows too." Janet bought the product, took it home, and used it. Her hair turned green and part of it fell out. If Janet sues the seller for breach of implied warranties of fitness and merchantability, what must she prove? Should she be successful?

2. Janet went into Friendly Pharmacy to purchase hair coloring. She wasn't sure which product she should buy, so she found a sales clerk and told the clerk that she was looking for a product which would lighten her hair. The clerk said, "You should use Hair Affair--it's wonderful. You can use it on your eyebrows too." Janet bought the product, took it home, and used it. Her hair turned green and part of it fell out. If Janet sues the seller under strict liability, what must she prove? Should she be successful?

3. Peter ordered a chicken sandwich from a restaurant. While eating, he was injured by a chicken bone that lodged in his throat. If Peter sues the restaurant for breach of the implied warranty of merchantability, should he recover damages?

4. Paula went to a sporting goods store and purchased a sleeping bag. The bag was defectively made and as a result, Paula suffered severe frostbite in her toes while camping in the mountains. Under what theory or theories of product liability may Paula be entitled to recover damages for her injuries under these facts?

No. 70-34

Sierra Club, Petitioner, v. Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al. | On Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit.

[April 19, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a National Game Refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January, 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June of 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges,[2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," and invoked the judicial review provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction . . . ." The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F. 2d 24. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them," *id.*, at 33, and concluded:

"We do not believe such club concern without a showing of more direct interest can constitute

[1] Act of July 3, 1926, 44 Stat. 821, 16 U. S. C. § 688.

[2] As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special use permit for construction of the resort exceeded the maximum acreage limitation placed upon such permits by 16 U. S. C. § 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park in alleged violation of 16 U. S. C. § 1, and that it would destroy timber and other natural resources protected by 16 U. S. C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U. S. C. § 45 (c) requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

> standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id.*, at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 U. S. 907, to review the questions of federal law presented.

II

The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U. S. 83, 101. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[3]

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 80 Stat. 392, 5 U. S. C. § 702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing.[4] But, in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 157, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.[5]

In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer servicing market through a ruling by the Comptroller of the Currency that national banks might perform data processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position *vis-à-vis* their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.[6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.[7] That question is presented in this case.

III

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise affect the scenery,

[3] Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat* v. *United States*, 219 U. S. 346, or to entertain "friendly" suits, *United States* v. *Johnson*, 319 U. S. 302, or to resolve "political questions," *Luther* v. *Borden*, 7 How. 1, because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," *Flast* v. *Cohen*, 392 U. S. 83, 100, is one within the power of Congress to determine. Cf. *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477; *Flast* v. *Cohen*, 392 U. S. 83, 120 (Harlan, J., dissenting); *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L. J. 816, 837 ff. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

[4] See, *e. g.*, *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932; *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914; *Duba* v. *Schuetzle*, 303 F. 2d 570, 574. The theory of a "legal interest" is expressed in its extreme form in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–481. See also *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118, 137–139.

[5] In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

[6] See, *e. g.*, *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 7; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83; *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477.

[7] No question of standing was raised in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area."

natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.[8]

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public."[9] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." *Id.*, at 14. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case,[10] since Scripps-Howard was clearly "aggrieved" by reason of the economic injury that it would suffer as a result of the Commission's action.[11] The Court's statement was rather directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477, as follows:

> "Congress had some purpose in enacting § 402 (b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.[12] It was in the

[8] The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:

"Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the Club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.

[9] This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 105:

"We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

[10] The statute involved was § 402 (b)(2) of the Communications Act of 1934, 48 Stat. 1064, 1093.

[11] This much is clear from the *Scripps-Howard* Court's citation of *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

[12] The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third

latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense that we have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing*, *supra*, at 154.

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[13] We noted this development with approval in *Data Processing*, *supra*, at 154, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury.

Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 2d 1093, 1097.[14] It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428. But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with an historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

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persons once the proceeding is properly initiated, is discussed in 3 Davis, Administrative Law Treatise, §§ 22.05–22.07 (1958).

[13] See, *e. g.*, *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 615–616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade* v. *Ewing*, 205 F. 2d 630, 631–632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

[14] See *Citizens Committee for the Hudson Valley* v. *Volpe*, n. 8, *supra*; *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 734–736; *Izaac Walton League* v. *St. Clair*, 313 F. Supp. 1312, 1317. See also *Scenic Hudson Preservation Conf.* v. *FPC*, *supra*, at 616:

"In order to ensure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act]."

In most, if not all of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

[15] In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

The short answer to this contention is that the "trap" does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, *supra*.

[16] Every schoolboy may be familiar with de Tocqueville's famous observation, written in the 1830's, that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (Alfred A. Knopf, 1945). Less familiar, however, is de Tocqueville's further observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton

As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing" [1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be dispoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King* v. *Morton.*

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.[2] The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.[3] The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.[4]

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor travelled it, though I have seen articles describing its proposed "development" [5] notably Hano, *Protec-*

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assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis for a prosecution." *Id.*, at 102.

[1] See generally *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); *Flast* v. *Cohen*, 392 U. S. 83 (1968). See also MR. JUSTICE BRENNAN's concurring opinion in *Barlow* v. *Collins*, *supra*, at 167. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficiently threatened to satisfy the case or controversy clause. *Data Processing Service* v. *Camp*, *supra*, at 154.

[2] *In rem* actions brought to adjudicate libellants' interests in vessels are well known in admiralty. Gilmore & Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. *The Comanche*, 75 U. S. (8 Wall.) 449, 476 (1869). And, in collision litigation, the first-libelled ship may counterclaim in its own name. *The Gylfe* v. *The Trujillo*, 209 F. 2d 396 (CA2 1954). Our case law has personified vessels:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron. . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed. . . . She acquires a personality of her own." *Tucker* v. *Alexandroff*, 183 U. S. 424, 438

[3] At common law, an office holder, such as a priest or the King, and his successors constituted a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the office holder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. *E. g.*, *Reid* v. *Barry*, 93 Fla. 849, 112 So. 846 (1927), discussed in Note, 12 Minn. L. Rev. 295 (1928), and in Note, 26 Mich. L. Rev. 545 (1928); see generally 1 Fletcher Cyclopedia Corporation, §§ 50–53; P. Potter, Law of Corporation 27 (1881).

[4] Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." The Case of Suttons Hospital, 77 Eng. Rep. 937, 973 (K. B. 1613). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. (4 Wheat.) 518, 636 (1819). Today suits in the names of corporations are taken for granted.

[5] Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation—hiking, camping and skiing (without lifts)—the Forest Service in 1949 and again in 1965 invited developers to submit proposals to "improve" the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least $3 million and a sleeping capacity of at least 100, Disney will spend $35.3 million and will bed down 3300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disneys' projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally; Note, Mineral King Valley: Who Shall Watch the Watchman?, 25 Rutgers L. Rev. 103, 107 (1970); That's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see Christian Science Monitor,

Environmental Defense Fund, Inc. v. *Ruckelshaus*, 439 F. 2d 584; *Environmental Defense Fund, Inc.* v. *HEW*, 428 F. 2d 1083; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In a Perspective: Administrative Limitation In A Political Setting. 11 Bos. C. I. & C. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[7]

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[8]

[7] The Forest Reserve Act of 1897, 30 Stat. 34, 16 U. S. C. § 551, imposed upon the Secretary of the Interior the duty to "preserve the [national] forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, 16 U. S. C. § 472. The phrase "occupancy and use" has been the cornerstone for the concept of "multiple use" of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the 1960 Multiple Use and Sustained Yield Act, 74 Stat. 215, 43 U. S. C. § 315, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called "maturity" of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonetheless, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this 240% harvest increase is not really overcutting but instead has resulted from its improved management of timberlands. "Improved management" answer the critics is only a euphemism for exaggerated regrowth forecasts by the Service. N. Y. Times, Nov. 15, 1971, at 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumbermen, conservationists head for new battle over government timber, 3 Nat. J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is *how* lumber should be harvested. Despite much criticism the Forest Service had adhered to a policy of permitting logging companies to "clearcut" tracts of auctioned acreage. "Clearcutting," somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees—regardless of size or age—often across hundreds of contiguous acres.

Of clearcutting Senator Gale McGee, a leading antagonist of Forest Service policy, complains: "The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected, if not ignored, streams are silting, and clearcutting remains a basic practice." N. Y. Times, Nov. 14, 1971, at 60, col. 2. He adds "In Wyoming . . . the Forest Service is very much nursemaid . . . to the lumber industry . . . ." Hearings on Management Practice on the Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, pt. 1, at 7 (1971).

Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. *Id.*, 9. See also 116 Cong. Rec. 36971 (1970) (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's "overriding concern for sawtimber production" and its "insensitivity to the related forest uses . . . and the public interest in environmental values." S. Doc. 91-115, 91st Cong., 2d Sess., 14 (1970). See also Behan, Timber Mining: Accusation or Prospect? 77 American Forests 4 (1971) (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Cal. L. Rev. 381-400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, the U. S. Forest Service; Smokey's Strip Miners, 3 The Washington Monthly 16 (1971). And at least one Forest Service study team shares some of these criticisms of clearcutting. U. S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of For. 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully fund budgets requested for the Forest Service's "timber sales and management." Frome, The Environment and Timber Resources, What's Ahead for Our Public Lands? 24 (A. Pyles ed. 1970).

[8] Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians *ad litem*, executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the

tionists v. *Recreationists*—the Battle of Mineral King. N. Y. Times Mag., Aug. 17, 1969; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that "One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." The District Court held that this uncontested allegation made the Sierra Club "sufficiently aggrieved" to have "standing" to sue on behalf of Mineral King.

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, or frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be a few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub. L. 91–90, 83 Stat. 852, 42 U. S. C. § 4321, *et seq.*, and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.[4] As early as 1894, Attorney General Olney predicted that regulatory agencies might become "industry-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

> "The Commission is or can be made of great use to the railroads. It satisfies the public clamor for supervision of the railroads, at the same time that supervision is almost entirely nominal. Moreover, the older the Commission gets to be, the more likely it is to take a business and railroad view of things." M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is supposed to protect." *Moss* v. *CAB*, 430 F. 2d 891, 893 (CADC 1970). See also *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1003–1004; *Udall* v. *FPC*, 387 U. S. 428; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F. 2d 1109;

Nov. 22, 1965, at 5, col. 1. Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "(t)he trampling effect alone eliminates vegatative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year." M. Frome, The Forest Service 69 (1971).

[4] The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies—printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly 45 (1971). For proceedings conducted by Senator Metcalf exposing these relationships, see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1737, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo. L. J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo. L. J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nadar Study Group Report On The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, Ralph Nader Study Group on the Interstate Commerce Commission and Transportation 15–39 and *passim* (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group on Food Protection and the Food and Drug Administration *passim* (1970); Massel, The Regulatory Process, 26 Law and Contemporary Problems 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life [8] which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

APPENDIX TO OPINION OF DOUGLAS, J.

Statement of the Solicitor-General:

. . . . . .

"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected, and that 'it would be aggrieved,' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies we have in our governmental system? Are there not many questions which must be decided by courts? Why should not the courts decide any question which any citizen wants to raise? As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the executive branch should have wide powers. All these officers have great responsibilities. They are no less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution. Analytically, one could have a system of government in which every legal question arising in the course of government would be decided by the courts. It would not be, I submit, a good system. More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I have already mentioned the most ancient of all, case or controversy, which was early relied on to prevent the presentation of feigned issues to the court. But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity,

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cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A. D.) as extinct by the Romans?

"When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time." 13 Conserv. 4 (Nov. 1971).

Aldo Leopold wrote in Round River (1953) p. 147:

"In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in quality, use Spessart oak. The north slope, which should be better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

"Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, *i. e.*, the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart."

[8] Senator Cranston has introduced a bill to establish a 35,000 acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well." Field & Stream, December 1971, p. 74.

mootness in various aspects, statutes of limitations and laches, jurisdictional amount, real party in interest and various questions in relation to joinder. Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts have broken down in varying degrees. I might also mention the explosive development of class actions which has thrown more and more issues into the courts. . . .

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the court before the administrator sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it is good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders. . . .

"I do not suggest that administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

MR. JUSTICE BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); and *Flast* v. *Cohen*, 392 U. S. 83 (1968). If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project underway will mount. (5) Once underway, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court's footnote 2, *ante*, p. 3, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U. S. C. § 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of National Park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order

to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today? And MR. JUSTICE DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sierra National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700–800 vehicles per hour and a peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real "user"—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, *ante*, pp. 11–12, other federal tribunals have not felt themselves so confined.[1] I would join those progressive holdings.

The Court chooses to conclude its opinion with a footnote reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne.[2]

LELAND R. SELNA, JR., San Francisco, Calif. (MATTHEW P. MITCHELL, FELDMAN, WALDMAN & KLINE, LEO E. BORREGARD, ROBERT W. JASPERSON, and GREGORY ARCHBALD, with him on the brief) for petitioner; ERWIN N. GRISWOLD, Solicitor General (SHIRO KASHIWA, Assistant Attorney General, WALTER KIECHEL, JR., Deputy Assistant Attorney General, WM. TERRY BRAY, Assistant to the Solicitor General, EDMUND B.

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[1] *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 1093, 1096–1097 (CADC 1970); *Citizens for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 101–105 (CA2 1970), cert. denied, 400 U. S. 949; *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608, 615–617 (CA2 1965); *Izaak Walton League* v. *St. Clair*, 313 F. Supp. 1312, 1316–1317 (Minn. 1970); *Environmenal Defense Fund, Inc.* v. *Corps of Engineers*, 324 F. Supp. 878, 879–880 (DC 1971); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 734–736 (ED Ark. 1971); *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 107–112 (Alas. 1971); *Upper Pecos Association* v. *Stans*, 328 F. Supp. 332, 333–334 (N. Mex. 1971); *Cape May County Chapter, Inc., Izaak Walton League* v. *Macchia*, 329 F. Supp. 504, 510–514 (N. J. 1971).

See *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F. 2d 689, 693–694 (CADC 1971); *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F. 2d 232, 234–235 (CA4 1971); *Environmental Defense Fund, Inc.* v. *HEW*, 428 F. 2d 1083, 1085 n. 2 (CADC 1970); *Honchok* v. *Hardin*, 326 F. Supp. 988, 991 (Md. 1971).

[2] "No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee." Devotions XVII.

§ 4321. Congressional declaration of purpose [NEPA § 2]

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Jan. 1, 1970, Pub.L. 91-190, § 2, 83 Stat. 852.)

Short Title

Section 1 of Pub.L. 91-190 Jan. 1, 1970, 83 Stat. 852, provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy [NEPA § 101]

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) Responsibility of each person to contribute to preservation and enhancement of environment

The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Jan. 1, 1970, Pub. L. 91-190, Title I, § 101, 83 Stat. 852.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d § 1782.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts [NEPA § 102]

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisonmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and infor-

mation useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Jan. 1, 1970, Pub.L. 91–190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, Pub.L. 94–83, 89 Stat. 424.)

[1] So in original. The period probably should be a semicolon.

§ 4333. Conformity of administrative procedures to national environmental policy [NEPA § 103]

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Jan. 1, 1970, Pub.L. 91–190, Title I, § 103, 83 Stat. 854.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d § 1782.

§ 4334. Other statutory obligations of agencies [NEPA § 104]

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the

§ 4335. Efforts supplemental to existing authorizations [NEPA § 105]

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Jan. 1, 1970, Pub.L. 91–190, Title I, § 105, 83 Stat. 854.)

Federal Practice and Procedure

Environmental class actions, see Wright, Miller & Kane: Civil 2d § 1782.

No. 94–859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS *v.* SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

No. 94–859. Argued April 17, 1995—Decided June 29, 1995

As relevant here, the Endangered Species Act of 1973 (ESA or Act) makes it unlawful for any person to "take" endangered or threatened species, §9(a)(1)(B), and defines "take" to mean to "harass, harm, pursue," "wound," or "kill," §3(19). In 50 CFR §17.3, petitioner Secretary of the Interior further defines "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." Respondents, persons and entities dependent on the forest products industries and others, challenged this regulation on its face, claiming that Congress did not intend the word "take" to include habitat modification. The District Court granted petitioners summary judgment, but the Court of Appeals ultimately reversed. Invoking the *noscitur a sociis* canon of statutory construction, which holds that a word is known by the company it keeps, the court concluded that "harm," like the other words in the definition of "take," should be read as applying only to the perpetrator's direct application of force against the animal taken.

Held: The Secretary reasonably construed Congress' intent when he defined "harm" to include habitat modification.

(a) The Act provides three reasons for preferring the Secretary's interpretation. First, the ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species. Unless "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate that of other words that §3 uses to define "take." Second, the ESA's broad purpose of providing comprehensive protection for endangered and threatened species supports the reasonableness of the Secretary's definition. Respondents advance strong arguments that activities causing minimal or unforseeable harm will not violate the Act as construed in the regulation, but their facial challenge would require that the Secretary's understanding of harm be invalidated in every circumstance. Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that §9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity," §10(a)(1)(B), strongly suggests that Congress understood §9 to prohibit indirect as well as deliberate takings. No one could seriously request an "incidental" take permit to avert §9 liability for direct, deliberate action against a member of an endangered or threatened species.

(b) The Court of Appeals made three errors in finding that "harm" must refer to a direct application of force because the words around it do. First, the court's premise was flawed. Several of the words accompanying "harm" in §3's definition of "take" refer to actions or effects that do not require direct applications of force. Second, to the extent that it read an intent or purpose requirement into the definition of "take," it ignored §9's express provision that a "knowing" action is enough to violate the Act. Third, the court employed *noscitur a sociis* to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning.

(c) The Act's inclusion of land acquisition authority, §5, and a directive to federal agencies to avoid destruction or adverse modification of critical habitat, §7, does not alter the conclusion reached in this case. Respondents' argument that the Government lacks any incentive to purchase land under §5 when it can simply prohibit takings under §9 ignores the practical considerations that purchasing habitat lands may be less expensive than pursuing criminal or civil penalties and that §5 allows for protection of habitat before any endangered animal has been harmed, whereas §9 cannot be enforced until a killing or injury has occurred. Section 7's directive applies only to the Federal Government, whereas §9 applies to "any person."

(d) The conclusion reached here gains further support from the statute's legislative history.

17 F. 3d 1463, reversed.

[1]The Act defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insects determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U. S. C. §1532(6).

[2]The Secretary, through the Director of the Fish and Wildlife Service, originally promulgated the regulation in 1975 and amended it in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation. See 40 Fed. Reg. 44412, 44416 (1975); 46 Fed. Reg. 54748, 54750 (1981).

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

JUSTICE STEVENS delivered the opinion of the Court.

The Endangered Species Act of 1973, 87 Stat. 884, 16 U. S. C. §1531 (1988 ed. and Supp. V) (ESA or Act), contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened. Section 9 of the Act makes it unlawful for any person to "take" any endangered or threatened species. The Secretary has promulgated a regulation that defines the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife." This case presents the question whether the Secretary exceeded his authority under the Act by promulgating that regulation.

I

Section 9(a)(1) of the Endangered Species Act provides the following protection for endangered species:[1]

> "Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—
>
> . . . . .
>
> "(B) take any such species within the United States or the territorial sea of the United States[.]" 16 U. S. C. §1538(a)(1).

Section 3(19) of the Act defines the statutory term "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U. S. C. §1532(19).

The Act does not further define the terms it uses to define "take." The Interior Department regulations that implement the statute, however, define the statutory term "harm":

> "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR §17.3 (1994).

This regulation has been in place since 1975.[2]

A limitation on the §9 "take" prohibition appears in §10(a)(1)(B) of the Act, which Congress added by amendment in 1982. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by §9(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. §1539(a)(1)(B).

In addition to the prohibition on takings, the Act provides several other protections for endangered species. Section 4, 16 U. S. C. §1533, commands the Secretary to identify species of fish or wildlife that are in danger of extinction and to publish from time to time lists of all species he determines to be endangered or threatened. Section 5, 16 U. S. C. §1534, authorizes the Secretary, in cooperation with the States, see 16 U. S. C. §1535, to acquire land to aid in preserving such species. Section

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7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U. S. C. §1536(a)(2).

Respondents in this action are small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests. They brought this declaratory judgment action against petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, in the United States District Court for the District of Columbia to challenge the statutory validity of the Secretary's regulation defining "harm," particularly the inclusion of habitat modification and degradation in the definition.[3] Respondents challenged the regulation on its face. Their complaint alleged that application of the "harm" regulation to the red-cockaded woodpecker, an endangered species,[4] and the northern spotted owl, a threatened species,[5] had injured them economically. App. 17–23.

Respondents advanced three arguments to support their submission that Congress did not intend the word "take" in §9 to include habitat modification, as the Secretary's "harm" regulation provides. First, they correctly noted that language in the Senate's original version of the ESA would have defined "take" to include "destruction, modification, or curtailment of [the] habitat or range" of fish or wildlife,[6] but the Senate deleted that language from the bill before enacting it. Second, respondents argued that Congress intended the Act's express authorization for the Federal Government to buy private land in order to prevent habitat degradation in §5 to be the exclusive check against habitat modification on private property. Third, because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, respondents argued that the court should not interpret the term so expansively as to include habitat modification.

The District Court considered and rejected each of respondents' arguments, finding "that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." 806 F. Supp. 279, 285 (1992). The court noted that in 1982, when Congress was aware of a judicial decision that had applied the Secretary's regulation, see *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 639 F. 2d 495 (CA9 1981) *(Palila I)*, it amended the Act without using the opportunity to change the definition of "take." 806 F. Supp., at 284. The court stated that, even had it found the ESA "'silent or ambiguous'" as to the authority for the Secretary's definition of "harm," it would nevertheless have upheld the regulation as a reasonable interpretation of the statute. *Id.*, at 285 (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984)). The District Court therefore entered summary judgment for petitioners and dismissed respondents' complaint.

A divided panel of the Court of Appeals initially affirmed the judgment of the District Court. 1 F. 3d 1 (CADC 1993). After granting a petition for rehearing, however, the panel reversed. 17 F. 3d 1463 (CADC 1994). Although acknowledging that "[t]he potential breadth of the word 'harm' is indisputable," *id.*, at 1464, the majority concluded that the immediate statutory context in which "harm" appeared counseled against a broad reading; like the other words in the definition of "take," the word "harm" should be read as applying only to "the perpetrator's direct application of force against the animal taken . . . . The forbidden acts fit, in ordinary language, the basic model 'A hit B.'" *Id.*, at 1465. The majority based its reasoning on a canon of statutory construction called *noscitur a sociis*, which holds that a word is known by the company it keeps. See *Neal* v. *Clark*, 95 U. S. 704, 708–709 (1878).

The majority claimed support for its construction from a decision of the Ninth Circuit that narrowly construed the word "harass" in the Marine Mammal Protection Act, 16 U. S. C. §1372(a)(2)(A), see *United States* v. *Hayashi*, 5 F. 3d 1278, 1282 (1993); from the legislative history of the ESA;[7] from its view that Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted; and from the ESA's land acquisition provision in §5 and restriction on federal agencies' activities regarding habitat in §7, both of which the court saw as evidence that Congress had not intended the §9 "take" prohibition to reach habitat modification. Most prominently, the court performed a lengthy analysis of the 1982 amendment to §10 that provided for "incidental take permits" and concluded that the amendment did not change the meaning of the term "take" as defined in the 1973 statute.[8]

Chief Judge Mikva, who had announced the panel's original decision, dissented. See 17 F. 3d, at 1473. In his view, a proper application of *Chevron* indicated that the Secretary had reasonably defined "harm," because respondents had failed to show that Congress unambiguously manifested its intent to exclude habitat modification from the ambit of "take." Chief Judge Mikva found the majority's reliance on *noscitur a sociis* inappropriate in light of the statutory language and unnecessary in light of the strong support in the legislative history for the Secretary's interpretation. He did not find the 1982 "incidental take permit" amendment alone sufficient to vindicate the Secretary's definition of "harm," but he believed the amendment provided additional support for that definition because it reflected Congress' view in 1982 that the definition was reasonable.

The Court of Appeals' decision created a square conflict with a 1988 decision of the Ninth Circuit that had upheld the Secretary's definition of "harm." See *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F. 2d 1106 (1988) *(Palila II)*. The Court of Appeals

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[3] Respondents also argued in the District Court that the Secretary's definition of "harm" is unconstitutionally void for vagueness, but they do not press that argument here.

[4] The woodpecker was listed as an endangered species in 1970 pursuant to the statutory predecessor of the ESA. See 50 CFR §17.11(h) (1994), issued pursuant to the Endangered Species Conservation Act of 1969, 83 Stat. 275.

[5] See 55 Fed. Reg. 26114 (1990). Another regulation promulgated by the Secretary extends to threatened species, defined in the ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U. S. C. §1532(20), some but not all of the protections endangered species enjoy. See 50 CFR 17.31(a) (1994). In the District Court respondents unsuccessfully challenged that regulation's extension of §9 to threatened species, but they do not press the challenge here.

[6] Senate 1983, reprinted in Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., 27 (1973).

[7] Judge Sentelle filed a partial concurrence in which he declined to join the portions of the court's opinion that relied on legislative history. See 17 F. 3d 1463, 1472 (CADC 1994).

[8] The 1982 amendment had formed the basis on which the author of the majority's opinion on rehearing originally voted to affirm the judgment of the District Court. Compare 1 F. 3d 1, 11 (CADC 1993) (Williams, J., concurring in part), with 17 F. 3d, at 1467–1472.

neither cited nor distinguished *Palila II*, despite the stark contrast between the Ninth Circuit's holding and its own. We granted certiorari to resolve the conflict. 513 U. S. ___ (1995). Our consideration of the text and structure of the Act, its legislative history, and the significance of the 1982 amendment persuades us that the Court of Appeals' judgment should be reversed.

II

Because this case was decided on motions for summary judgment, we may appropriately make certain factual assumptions in order to frame the legal issue. First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume *arguendo* that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured. Under respondents' view of the law, the Secretary's only means of forestalling that grave result—even when the actor knows it is certain to occur[9]—is to use his §5 authority to purchase the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the §9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to §10.

The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable. First, an ordinary understanding of the word "harm" supports it. The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.

Respondents argue that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm."[10] Moreover, unless the statutory term "harm" encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that §3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation. See, *e.g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837, and n. 11 (1988).[11]

Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA* v. *Hill*, 437 U. S. 153 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.*, at 180. Whereas predecessor statutes enacted in 1966 and 1969 had not contained any sweeping prohibition against the taking of endangered species except on federal lands, see *id.*, at 175, the 1973 Act applied to all land in the United States and to the Nation's territorial seas. As stated in §2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." 16 U. S. C. §1531(b).

In *Hill*, we construed §7 as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. See 437 U. S., at 193. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.*, at 184. Although the §9 "take" prohibition was not at issue in *Hill*, we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his

[9] As discussed above, the Secretary's definition of "harm" is limited to "act[s] which actually kill[] or injur[e] wildlife." 50 CFR §17.3 (1994). In addition, in order to be subject to the Act's criminal penalties or the more severe of its civil penalties, one must "knowingly violat[e]" the Act or its implementing regulations. 16 U. S. C. §§1540(a)(1),(b)(1). Congress added "knowingly" in place of "willfully" in 1978 to make "criminal violations of the act a general rather than a specific intent crime." H. R. Conf. Rep. No. 95–1804, p. 26 (1978). The Act does authorize up to a $500 civil fine for "[a]ny person who otherwise violates" the Act or its implementing regulations. 16 U. S. C. §1540(a)(1). That provision is potentially sweeping, but it would be so with or without the Secretary's "harm" regulation, making it unhelpful in assessing the reasonableness of the regulation. We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter, see, *e.g.*, *Staples* v. *United States*, 511 U. S. ___ (1994), but the proper case in which we might consider whether to do so in the §9 provision for a $500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term. We do not agree with the dissent that the regulation covers results that are not "even foreseeable . . . no matter how long the chain of causality between modification and injury." *Post*, at 2. Respondents have suggested no reason why either the "knowingly violates" or the "otherwise violates" provision of the statute—or the "harm" regulation itself—should not be read to incorporate ordinary requirements of proximate causation and foreseeability. In any event, neither respondents nor their *amici* have suggested that the Secretary employs the "otherwise violates" provision with any frequency.

[10] Respondents and the dissent emphasize what they portray as the "established meaning" of "take" in the sense of a "wildlife take," a meaning respondents argue extends only to "the effort to exercise dominion over some creature, and the concrete effect of *[sic]* that creature." Brief for Respondents 19; see *post*, at 4–5. This limitation ill serves the statutory text, which forbids not taking "some creature" but "tak[ing] any [endangered] *species*"—a formidable task for even the most rapacious feudal lord. More importantly, Congress explicitly defined the operative term "take" in the ESA, no matter how much the dissent wishes otherwise, see *post*, at 4–7, 11–12, thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term "harm." Finally, Congress' definition of "take" includes several words—most obviously "harass," "pursue," and "wound," in addition to "harm" itself—that fit respondents' and the dissent's definition of "take" no better than does "significant habitat modification or degradation."

[11] In contrast, if the statutory term "harm" encompasses such indirect means of killing and injuring wildlife as habitat modification, the other terms listed in §3—"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect"—generally retain independent meanings. Most of those terms refer to deliberate actions more frequently than does "harm," and they therefore do not duplicate the sense of indirect causation that "harm" adds to the statute. In addition, most of the other words in the definition describe either actions from which habitat modification does not usually result (*e.g.*, "pursue," "harass") or effects to which activities that modify habitat do not usually lead (*e.g.*, "trap," "collect"). To the extent the Secretary's definition of "harm" may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act. See *infra*, at 9–11.

definition of "harm."[12] In light of that provision for habitat protection, we could "not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." *Id.*, at 184, n. 30. Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.

Respondents advance strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the "harm" regulation. Respondents, however, present a facial challenge to the regulation. Cf. *Anderson* v. *Edwards*, 514 U. S. ___, ___, n. 6 (1995) (slip op., at 11); *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 188 (1991). Thus, they ask us to invalidate the Secretary's understanding of "harm" in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable.[13]

Third, the fact that Congress in 1982 authorized the Secretary to issue permits for takings that §9(a)(1)(B) would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U. S. C. §1539(a)(1)(B), strongly suggests that Congress understood §9(a)(1)(B) to prohibit indirect as well as deliberate takings. Cf. *NLRB* v. *Bell Aerospace Co. of Textron, Inc.*, 416 U. S. 267, 274–275 (1974). The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U. S. C. §1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental effects on listed species.[14] No one could seriously request an "incidental" take permit to avert §9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read "harm" so narrowly that the permit procedure would have little more than that absurd purpose. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U. S. ___, ___ (1995) (slip op., at 10). Congress' addition of the §10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

The Court of Appeals made three errors in asserting that "harm" must refer to a direct application of force because the words around it do.[15] First, the court's premise was flawed. Several of the words that accompany "harm" in the §3 definition of "take," especially "harass," "pursue," "wound," and "kill," refer to actions or effects that do not require direct applications of force. Second, to the extent the court read a requirement of intent or purpose into the words used to define "take," it ignored §9's express provision that a "knowing" action is enough to violate the Act. Third, the court employed *noscitur a sociis* to give "harm" essentially the same function as other words in the definition, thereby denying it independent meaning. The canon, to the contrary, counsels that a word "gathers meaning from the words around it." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modification permissibly interprets "harm" to have "a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923).[16]

Nor does the Act's inclusion of the §5 land acquisition authority and the §7 directive to federal agencies to avoid destruction or adverse modification of critical habitat alter our conclusion. Respondents' argument that the Government lacks any incentive to purchase

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[12] We stated: "The Secretary of the Interior has defined the term 'harm' to mean 'an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of "harm."*'" *TVA* v. *Hill*, 437 U. S. 153, 184–185, n. 30 (1978) (citations omitted; emphasis in original).

[13] The dissent incorrectly asserts that the Secretary's regulation (1) "dispenses with the foreseeability of harm" and (2) "fail[s] to require injury to particular animals," *post*, at 19. As to the first assertion, the regulation merely implements the statute, and it is therefore subject to the statute's "knowingly violates" language, see 16 U. S. C. §§1540(a)(1),(b)(1), and ordinary requirements of proximate causation and foreseeability. See n. 9, *supra*. Nothing in the regulation purports to weaken those requirements. To the contrary, the word "actually" in the regulation should be construed to limit the liability about which the dissent appears most concerned, liability under the statute's "otherwise violates" provision. See n. 9, *supra*; *post*, at 8–9, 19–20. The Secretary did not need to include "actually" to connote "but for" causation, which the other words in the definition obviously require. As to the dissent's second assertion, every term in the regulation's definition of "harm" is subservient to the phrase "an act which actually kills or injures wildlife."

[14] The dissent acknowledges the legislative history's clear indication that the drafters of the 1982 amendment had habitat modification in mind, see *post*, at 18, but argues that the text of the amendment requires a contrary conclusion. This argument overlooks the statute's requirement of a "conservation plan," which must describe an alternative to a known, but undesired, habitat modification.

[15] The dissent makes no effort to defend the Court of Appeals' reading of the statutory definition as requiring a direct application of force. Instead, it tries to impose on §9 a limitation of liability to "affirmative conduct intentionally directed against a particular animal or animals." *Post*, at 7. Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under §9(a)(1)(B); unless the developer was motivated by a desire "to get at a turtle," *post*, at 8, no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from §9 liability, even though the words "kill" and "harm" in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals' interpretation apply as well to the dissent's novel construction.

[16] Respondents' reliance on *United States* v. *Hayashi*, 22 F. 3d 859 (CA9 1993) is also misplaced. *Hayashi* construed the term "harass," part of the definition of "take" in the Marine Mammal Protection Act of 1972, 16 U. S. C. §1361 *et seq.*, as requiring a "direct intrusion" on wildlife to support a criminal prosecution. 22 F. 3d, at 864. *Hayashi* dealt with a challenge to a single application of a statute whose "take" definition includes neither "harm" nor several of the other words that appear in the ESA definition. Moreover, *Hayashi* was decided by a panel of the Ninth Circuit, the same court that had previously upheld the regulation at issue here in *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F. 2d 1106 (1988) *(Palila II)*. Neither the *Hayashi* majority nor the dissent saw any need to distinguish or even to cite *Palila II*.

land under §5 when it can simply prohibit takings under §9 ignores the practical considerations that attend enforcement of the ESA. Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the §5 procedure allows for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the §9 prohibition until an animal has actually been killed or injured. The Secretary may also find the §5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species. The §7 directive applies only to the Federal Government, whereas the §9 prohibition applies to "any person." Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that §9 does not replicate, and §7 does not limit its admonition to habitat modification that "actually kills or injures wildlife." Conversely, §7 contains limitations that §9 does not, applying only to actions "likely to jeopardize the continued existence of any endangered species or threatened species," 16 U. S. C. §1536(a)(2), and to modifications of habitat that has been designated "critical" pursuant to §4, 16 U. S. C. §1533(b)(2).[17] Any overlap that §5 or §7 may have with §9 in particular cases is unexceptional, see, *e.g.*, *Russello* v. *United States*, 464 U. S. 16, 24, and n. 2 (1983), and simply reflects the broad purpose of the Act set out in §2 and acknowledged in *TVA* v. *Hill*.

We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. See generally *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation. See Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986).[18]

[17] Congress recognized that §§7 and 9 are not coextensive as to federal agencies when, in the wake of our decision in *Hill* in 1978, it added §7(o), 16 U. S. C. §1536(o), to the Act. That section provides that any federal project subject to exemption from §7, 16 U. S. C. §1536(h), will also be exempt from §9.

[18] Respondents also argue that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties. The rule of lenity is premised on two ideas: first, "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'"; second, "legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U. S. 336, 347–350 (1971) (quoting *McBoyle* v. *United States*, 282 U. S. 25, 27 (1931)). We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles—where no regulation was present. See *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 517–518, and n. 9 (1992). We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.

III

Our conclusion that the Secretary's definition of "harm" rests on a permissible construction of the ESA gains further support from the legislative history of the statute. The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of "harm," but they make clear that Congress intended "take" to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93–307, p. 7 (1973). The House Report stated that "the broadest possible terms" were used to define restrictions on takings. H. R. Rep. No. 93–412, p. 15 (1973). The House Report underscored the breadth of the "take" definition by noting that it included "harassment, *whether intentional or not*." *Id.*, at 11 (emphasis added). The Report explained that the definition "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Ibid.* These comments, ignored in the dissent's welcome but selective foray into legislative history, see *post*, at 14–16, support the Secretary's interpretation that the term "take" in §9 reached far more than the deliberate actions of hunters and trappers.

Two endangered species bills, S. 1592 and S. 1983, were introduced in the Senate and referred to the Commerce Committee. Neither bill included the word "harm" in its definition of "take," although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted. See Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., pp. 7, 27 (1973) (hereinafter Hearings). Senator Tunney, the floor manager of the bill in the Senate, subsequently introduced a floor amendment that added "harm" to the definition, noting that this and accompanying amendments would "help to achieve the purposes of the bill." 119 Cong. Rec. 25683 (July 24, 1973). Respondents argue that the lack of debate about the amendment that added "harm" counsels in favor of a narrow interpretation. We disagree. An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.

The definition of "take" that originally appeared in S. 1983 differed from the definition as ultimately enacted in one other significant respect: It included "the destruction, modification, or curtailment of [the] habitat or range" of fish and wildlife. Hearings, at 27. Respondents make much of the fact that the Commerce Committee removed this phrase from the "take" definition before S. 1983 went to the floor. See 119 Cong. Rec. 25663 (1973). We do not find that fact especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today. Most notably, the habitat protection in S. 1983 would have applied far more broadly than the regulation does because it made adverse habitat modification a categorical violation of the "take" prohibition, unbounded by the regulation's limitation to habitat modifications that actually kill or injure wildlife. The S. 1983 language also failed to qualify "modification" with the regulation's

limiting adjective "significant." We do not believe the Senate's unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary's "harm" regulation.[19]

The history of the 1982 amendment that gave the Secretary authority to grant permits for "incidental" takings provides further support for his reading of the Act. The House Report expressly states that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H. R. Rep. No. 97–567, p. 31 (1982). This reference to the foreseeability of incidental takings undermines respondents' argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. See S. Rep. No. 97–418, p. 10 (1982); H. R. Conf. Rep. No. 97–835, pp. 30–32 (1982). Thus, Congress in 1982 focused squarely on the aspect of the "harm" regulation at issue in this litigation. Congress' implementation of a permit program is consistent with the Secretary's interpretation of the term "harm."

IV

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. See 16 U. S. C. §§1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under §10 for takings that would otherwise violate §9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. See *Chevron*, 467 U. S., at 865–866. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

My agreement with the Court is founded on two understandings. First, the challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals. Second, even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability. These limitations, in my view, call into question *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F. 2d 1106 (CA9 1988) *(Palila II)*, and with it, many of the applications derided by the dissent. Because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply, I join the opinion of the Court.

In my view, the regulation is limited by its terms to actions that actually kill or injure individual animals. JUSTICE SCALIA disagrees, arguing that the harm regulation "encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species." *Post*, at 4–5. At one level, I could not reasonably quarrel with this observation; death to an individual animal always reduces the size of the population in which it lives, and in that sense, "injures" that population. But by its insight, the dissent means something else. Building upon the regulation's use of the word "breeding," JUSTICE SCALIA suggests that the regu-

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[19] Respondents place heavy reliance for their argument that Congress intended the §5 land acquisition provision and not §9 to be the ESA's remedy for habitat modification on a floor statement by Senator Tunney:

"Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . ." 119 Cong. Rec. 25669 (1973).

Similarly, respondents emphasize a floor statement by Representative Sullivan, the House floor manager for the ESA:

"For the most part, the principal threat to animals stems from destruction of their habitat. . . . H. R. 37 will meet this problem by providing funds for acquisition of critical habitat . . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

"Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.*, at 30162.

Each of these statements merely explained features of the bills that Congress eventually enacted in §5 of the ESA and went on to discuss elements enacted in §9. Neither statement even suggested that §5 would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of §9. Respondents' suggestion that these statements identified §5 as the ESA's only response to habitat modification contradicts their emphasis elsewhere on the habitat protections in §7. See *supra*, at 14.

lation facially bars significant habitat modification that actually kills or injures *hypothetical* animals (or, perhaps more aptly, causes potential additions to the population not to come into being). Because "[i]mpairment of breeding does not 'injure' living creatures," JUSTICE SCALIA reasons, the regulation *must* contemplate application to "a *population* of animals which would otherwise have maintained or increased its numbers." *Post*, at 5, 22.

I disagree. As an initial matter, I do not find it as easy as JUSTICE SCALIA does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To "injure" is, among other things, "to impair." Webster's Ninth New Collegiate Dictionary 623 (1983). One need not subscribe to theories of "psychic harm," cf. *post*, at 22, n. 5, to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury.

In any event, even if impairing an animal's ability to breed were not, *in and of itself*, an injury to that animal, interference with breeding can cause an animal to suffer other, perhaps more obvious, kinds of injury. The regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation. In contrast to JUSTICE SCALIA, I do not read the regulation's "breeding" reference to vitiate or somehow to qualify the clear actual death or injury requirement, or to suggest that the regulation contemplates extension to nonexistent animals.

There is no inconsistency, I should add, between this interpretation and the commentary that accompanied the amendment of the regulation to include the actual death or injury requirement. See 46 Fed. Reg. 54748 (1981). Quite the contrary. It is true, as JUSTICE SCALIA observes, *post*, at 5, that the Fish and Wildlife Service states at one point that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," see 46 Fed. Reg. 54748 (1981). But one could just as easily emphasize the word "direct" in this sentence as the word "individual."* Elsewhere in the commentary, the Service makes clear that "section 9's threshold does focus on individual members of a protected species." *Id.*, at 54749. Moreover, the Service says that the regulation has no application to speculative harm, explaining that its insertion of the word "actually" was intended "to bulwark the need for proven injury to a species due to a party's actions." *Ibid.*; see also *ibid.* (approving language that "Harm covers actions . . . which actually (as opposed to potentially), cause injury"). That a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary reflects, the regulation requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species.

By the dissent's reckoning, the regulation at issue here, in conjunction with 16 U. S. C. §1540(1), imposes liability for any habitat-modifying conduct that ultimately results in the death of a protected animal, "regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury." *Post*, at 3–4; see also *post*, at 10. Even if §1540(1) does create a strict liability regime (a question we need not decide at this juncture), I see no indication that Congress, in enacting that section, intended to dispense with ordinary principles of proximate causation. Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct. See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 559–560 (5th ed. 1984) (describing "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context). I would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle. In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under §1540(1) only if their habitat-modifying actions proximately cause death or injury to protected animals. Cf. *Benefiel* v. *Exxon Corp.*, 959 F. 2d 805, 807–808 (CA9 1992) (in enacting the Trans-Alaska Pipeline Authorization Act, which provides for strict liability for damages that are the result of discharges, Congress did not intend to abrogate common-law principles of proximate cause to reach "remote and derivative" consequences); *New York* v. *Shore Realty Corp.*, 759 F. 2d 1032, 1044, and n. 17 (CA2 1985) (noting that "[t]raditional tort law has often imposed strict liability while recognizing a causation defense," but that, in enacting CERCLA, Congress "specifically rejected including a causation requirement"). The regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word "actually," the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation.

Proximate causation is not a concept susceptible of precise definition. See Keeton, *supra*, at 280–281. It is

*JUSTICE SCALIA suggests that, if the word "direct" merits emphasis in this sentence, then the sentence should be read as an effort to negate principles of proximate causation. See *post*, at 22, n. 5. As this case itself demonstrates, however, the word "direct" is susceptible of many meanings. The Court of Appeals, for example, used "direct" to suggest an element of purposefulness. See *Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt*, 17 F. 3d 1463, 1465 (CADC 1994). So, occasionally, does the dissent. See *post*, at 7 (describing "affirmative acts . . . which are *directed* immediately and intentionally against a particular animal") (emphasis added). It is not hard to imagine conduct that, while "indirect" (*i.e.*, nonpurposeful), proximately causes actual death or injury to individual protected animals, cf. *post*, at 20; indeed, principles of proximate cause routinely apply in the negligence and strict liability contexts.

easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have recently said that proximate causation "normally eliminates the bizarre," *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. ___, ___ (1995) (slip op., at 9), and have noted its "functionally equivalent" alternative characterizations in terms of foreseeability, see *Milwaukee & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 475 (1877) ("natural and probable consequence"), and duty, see *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). *Consolidated Rail Corp.* v. *Gottshall*, 512 U. S. ___, ___ (1994) (slip op., at 13). Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts. But I note, at the least, that proximate cause principles inject a foreseeability element into the statute, and hence, the regulation, that would appear to alleviate some of the problems noted by the dissent. See, *e. g.*, *post*, at 8 (describing "a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish").

In my view, then, the "harm" regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected under the Endangered Species Act. Pursuant to my interpretation, *Palila II*—under which the Court of Appeals held that a state agency committed a "taking" by permitting feral sheep to eat mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.

This case, of course, comes to us as a facial challenge. We are charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation *(Palila II)* that is, in my view, inconsistent with the regulation's *own* limitations. That misapplication does not, however, call into question the validity of the regulation itself. One can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority. However, it seems to me clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications. Congress may, of course, see fit to revisit this issue. And nothing the Court says today prevents the agency itself from narrowing the scope of its regulation at a later date.

With this understanding, I join the Court's opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.

I

The Endangered Species Act of 1973, 16 U. S. C. §1531 *et seq.* (1988 ed. and Supp. V) (Act), provides that "it is unlawful for any person subject to the jurisdiction of the United States to take any [protected] species within the United States." §1538(a)(1)(B). The term "take" is defined as "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." §1532(19) (emphasis added). The challenged regulation defines "harm" thus:

> "'Harm' in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR §17.3 (1994).

In my view petitioners must lose—the regulation must fall—even under the test of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), so I shall assume that the Court is correct to apply *Chevron*. See *ante*, at 15–16, and n. 18.

The regulation has three features which, for reasons I shall discuss at length below, do not comport with the statute. First, it interprets the statute to prohibit habitat modification that is no more than the cause-in-fact of death or injury to wildlife. *Any* "significant habitat modification" that in fact produces that result by "impairing essential behavioral patterns" is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury. See, *e.g.*, *Palila* v. *Hawaii Dept. of Land and Natural Resources (Palila II)*, 852 F. 2d 1106, 1108–1109 (CA9 1988) (sheep grazing constituted "taking" of palila birds, since although sheep do not destroy full-grown mamane trees, they do destroy mamane seedlings, which will not grow to full-grown trees, on which the palila feeds and nests). See also Davison, Alteration of Wildlife Habitat as a Prohibited Taking under the Endangered Species Act, 10 J. Land Use & Envtl. L. 155, 190 (1995) (regulation requires only causation-in-fact).

Second, the regulation does not require an "act": the Secretary's officially stated position is that an *omission* will do. The previous version of the regulation made this explicit. See 40 Fed. Reg. 44412, 44416 (1975) ("'Harm' in the definition of 'take' in the Act means an act or omission which actually kills or injures wildlife . . ."). When the regulation was modified in 1981 the phrase "or omission" was taken out, but only because (as the final publication of the rule advised) "the [Fish and Wildlife] Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by section [1538(a)(1)(B)]." 46 Fed. Reg. 54748, 54750 (1981). In its brief here the Government agrees that the regulation covers omissions, see Brief for Petitioners 47 (although it argues that "[a]n 'omission' constitutes an

'act' . . . only if there is a legal duty to act"), *ibid.*

The third and most important unlawful feature of the regulation is that it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species. "Injury" in the regulation includes "significantly impairing essential behavioral patterns, including *breeding*," 50 CFR §17.3 (1994) (emphasis added). Impairment of breeding does not "injure" living creatures; it prevents them from propagating, thus "injuring" *a population* of animals which would otherwise have maintained or increased its numbers. What the face of the regulation shows, the Secretary's official pronouncements confirm. The Final Redefinition of "Harm" accompanying publication of the regulation said that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981), and refers to "injury *to a population*," *id.*, at 54749 (emphasis added). See also *Palila II*, 852 F. 2d, at 1108; Davison, *supra*, at 190, and n. 177, 195; M. Bean, The Evolution of National Wildlife Law 344 (1983).[1]

None of these three features of the regulation can be found in the statutory provisions supposed to authorize it. The term "harm" in §1532(19) has no legal force of its own. An indictment or civil complaint that charged the defendant with "harming" an animal protected under the Act would be dismissed as defective, for the only *operative* term in the statute is to "take." If "take" were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To "take," when applied to wild animals, means to reduce those animals, by killing or capturing, to human control. See, *e.g.*, 11 Oxford English Dictionary (1933) ("Take . . . To catch, capture (a wild beast, bird, fish, etc.)"); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer* v. *Connecticut*, 161 U. S. 519, 523 (1896) ("[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them") (quoting the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*"). This is just the sense in which "take" is used elsewhere in federal legislation and treaty. See, *e.g.*, Migratory Bird Treaty Act, 16 U. S. C. §703 (1988 ed., Supp. V) (no person may "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Art. I, 27 U. S. T. 3918, 3921, T. I. A. S. No. 8409 (defining "taking" as "hunting, killing and capturing"). And that meaning fits neatly with the rest of §1538(a)(1), which makes it unlawful not only to take protected species, but also to import or export them (§1538(a)(1)(A)); to possess, sell, deliver, carry, transport, or ship any taken species (§1538(a)(1)(D)); and to transport, sell, or offer to sell them in interstate or foreign commerce (§§1538(a)(1)(E), (F). The taking prohibition, in other words, is only part of the regulatory plan of §1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

The Act's definition of "take" does expand the word slightly (and not unusually), so as to make clear that it includes not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process ("to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"); and so as to include attempts. §1532(19). The tempting fallacy—which the Court commits with abandon, see *ante*, at 9, n. 10—is to assume that *once defined*, "take" loses any significance, and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the §1532(19) definition as a self-executing prohibition, and had not enacted §1538(a)(1)(B) at all. But §1538(a)(1)(B) *is* there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"—the only operative term—out of the statute altogether.[2]

That is what has occurred here. The verb "harm" has a *range* of meaning: "to cause injury" at its broadest, "to do hurt or damage" in a narrower and more direct sense. See, *e.g.*, 1 N. Webster, An American Dictionary of the English Language (1828) ("Harm, *v.t.* To hurt; to injure; to damage; *to impair soundness of body, either animal* or vegetable") (emphasis added); American College Dictionary 551 (1970) ("harm . . . *n.* injury; damage; hurt: *to do him bodily harm*"). In fact the more directed sense of "harm" is a somewhat more common and preferred usage; "*harm* has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended." J. Opdycke, Mark My Words: A Guide to Modern Usage and Expression 330 (1949). See also American Heritage Dictionary of the English Language (1981) ("*Injure* has the widest range. . . . *Harm* and *hurt* refer principally to what causes physical or mental distress to living things"). To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that "harm" defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish, has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Here the evidence shows the opposite. "Harm" is

[1] The Court and JUSTICE O'CONNOR deny that the regulation has the first or the third of these features. I respond to their arguments in Part III, *infra*.

[2] The Court suggests halfheartedly that "take" cannot refer to the taking of particular animals, because §1538(a)(1)(B) prohibits "tak[ing] any [endangered] *species*." *Ante*, at 9, n. 10. The suggestion is halfhearted because that reading obviously contradicts the statutory intent. It would mean no violation in the intentional shooting of a single bald eagle—or, for that matter, the intentional shooting of 1,000 bald eagles out of the extant 1,001. The phrasing of §1538(a)(1)(B), as the Court recognizes elsewhere, see, *e.g.*, *ante*, at 7, is shorthand for "take any *member of* [an endangered] species."

merely one of 10 prohibitory words in §1532(19), and the other 9 fit the ordinary meaning of "take" perfectly. To "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect" are all affirmative acts (the provision itself describes them as "conduct," see §1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals. The Court points out that several of the words ("harass," "pursue," "wound," and "kill") "refer to actions or effects that do not require direct *applications of force*." *Ante*, at 13 (emphasis added). That is true enough, but force is not the point. Even "taking" activities in the narrowest sense, activities traditionally engaged in by hunters and trappers, do not all consist of direct applications of force; pursuit and harassment are part of the business of "taking" the prey even before it has been touched. What the nine other words in §1532(19) have in common—and share with the narrower meaning of "harm" described above, but not with the Secretary's ruthless dilation of the word—is the sense of affirmative conduct intentionally directed against a particular animal or animals.

I am not the first to notice this fact, or to draw the conclusion that it compels. In 1981 the Solicitor of the Fish and Wildlife Service delivered a legal opinion on §1532(19) that is in complete agreement with my reading:

> "The Act's definition of 'take' contains a list of actions that illustrate the intended scope of the term . . . . With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis*, . . . the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Memorandum of April 17, 1981, reprinted in 46 Fed. Reg. 29490, 29491 (emphasis in original).

I would call it *noscitur a sociis*, but the principle is much the same: the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well," *Beecham* v. *United States*, 511 U. S. ___, ___ (1994) (slip op., at 3). The Court contends that the canon cannot be applied to deprive a word of all its "independent meaning," *ante*, at 14. That proposition is questionable to begin with, especially as applied to long lawyers' listings such as this. If it were true, we ought to give the word "trap" in the definition its rare meaning of "to clothe" (whence "trappings")—since otherwise it adds nothing to the word "capture." See *Moskal* v. *United States*, 498 U. S. 103, 120 (1990) (SCALIA, J., dissenting). In any event, the Court's contention that "harm" in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not. To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

The penalty provisions of the Act counsel this interpretation as well. Any person who "knowingly" violates §1538(a)(1)(B) is subject to criminal penalties under §1540(b)(1) and civil penalties under §1540(a)(1); moreover, under the latter section, any person "who otherwise violates" the taking prohibition (*i.e.*, violates it *un*knowingly) may be assessed a civil penalty of $500 for each violation, with the stricture that "[e]ach such violation shall be a separate offense." This last provision should be clear warning that the regulation is in error, for when combined with the regulation it produces a result that no legislature could reasonably be thought to have intended: A large number of routine private activities—farming, for example, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee (or to disprove) the "injury" may be (*e.g.*, an "impairment" of breeding). The Court says that "[the strict-liability provision] is potentially sweeping, but it would be so with or without the Secretary's 'harm' regulation." *Ante*, at 8, n. 9. That is not correct. Without the regulation, the routine "habitat modifying" activities that people conduct to make a daily living would not carry exposure to strict penalties; only acts directed at animals, like those described by the other words in §1532(19), would risk liability.

The Court says that "[to] read a requirement of intent or purpose into the words used to define 'take' . . . ignore[s] [§1540's] express provision that a 'knowing' action is enough to violate the Act." *Ante*, at 13. This presumably means that because the reading of §1532(19) advanced here ascribes an element of purposeful injury to the prohibited acts, it makes superfluous (or inexplicable) the more severe penalties provided for a "knowing" violation. That conclusion does not follow, for it is quite possible to take protected wildlife purposefully without doing so knowingly. A requirement that a violation be "knowing" means that the defendant must "know the facts that make his conduct illegal," *Staples* v. *United States*, 511 U. S. ___, ___ (1994) (slip op., at 6). The hunter who shoots an elk in the mistaken belief that it is a mule deer has not knowingly violated §1538(a)(1)(B)—not because he does not know that elk are legally protected (that would be knowledge of the law, which is not a requirement, see *ante*, at 8, n. 9), but because he does not know what sort of animal he is shooting. The hunter has nonetheless committed a purposeful taking of protected wildlife, and would therefore be subject to the (lower) strict-liability penalties for the violation.

So far I have discussed only the immediate statutory text bearing on the regulation. But the definition of "take" in §1532(19) applies "[f]or the purposes of this chapter," that is, it governs the meaning of the word *as used everywhere in the Act*. Thus, the Secretary's interpretation of "harm" is wrong if it does not fit with the use of "take" throughout the Act. And it does not. In §1540(e)(4)(B), for example, Congress provided for the forfeiture of "[a]ll guns, traps, nets, and other equipment . . . used to aid the taking, possessing, selling, [etc.]" of protected animals. This listing plainly relates to "taking" in the ordinary sense. If environmental modification were part (and necessarily a major part) of taking, as the Secretary maintains, one would have expected the list to include "plows, bulldozers, and backhoes." As another example, §1539(e)(1) exempts "the taking of any endangered species" by Alaskan Indians and Eskimos "if such taking is primarily for subsistence purposes"; and provides that "[n]on-edible byproducts of species taken pursuant to this section may be sold . . . when made into authentic native articles of handicrafts

and clothing." Surely these provisions apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification. The Act is full of like examples. See, *e.g.*, §1538(a)(1)(D) (prohibiting possession, sale, and transport of "species taken in violation" of the Act). "[I]f the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout," *Gustafson* v. *Alloyd Co.*, 513 U. S. ___, ___ (1995) (slip op., at 6), the regulation must fall.

The broader structure of the Act confirms the unreasonableness of the regulation. Section 1536 provides:

> "Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or *result in the destruction or adverse modification of habitat* of such species which is determined by the Secretary . . . to be critical." 16 U. S. C. §1536(a)(2) (emphasis added).

The Act defines "critical habitat" as habitat that is "essential to the conservation of the species," §§1532(5)(A)(i), (A)(ii), with "conservation" in turn defined as the use of methods necessary to bring listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary." §1532(3).

These provisions have a double significance. Even if §§1536(a)(2) and 1538(a)(1)(B) were totally independent prohibitions—the former applying only to federal agencies and their licensees, the latter only to private parties—Congress's explicit prohibition of habitat modification in the one section would bar the inference of an implicit prohibition of habitat modification in the other section. "[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U. S. ___, ___ (1993) (slip op., at 7–8) (internal quotation marks omitted). And that presumption against implicit prohibition would be even stronger where the one section which uses the language carefully defines and limits its application. That is to say, it would be passing strange for Congress carefully to define "critical habitat" as used in §1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible "habitat modification" (under the guise of "harm") in §1538(a)(1)(B).

In fact, however, §§1536(a)(2) and 1538(a)(1)(B) do *not* operate in separate realms; federal agencies are subject to *both*, because the "person[s]" forbidden to take protected species under §1538 include agencies and departments of the Federal Government. See §1532(13). This means that the "harm" regulation also contradicts another principle of interpretation: that statutes should be read so far as possible to give independent effect to all their provisions. See *Ratzlaf* v. *United States*, 510 U. S. ___, ___ (slip op., at 6–8). By defining "harm" in the definition of "take" in §1538(a)(1)(B) to include significant habitat modification that injures populations of wildlife, the regulation makes the habitat-modification restriction in §1536(a)(2) almost wholly superfluous. As "critical habitat" is habitat "essential to the conservation of the species," adverse modification of "critical" habitat by a federal agency would also constitute habitat modification that injures a population of wildlife.

Petitioners try to salvage some independent scope for §1536(a)(2) by the following contortion: because the definition of critical habitat includes not only "the specific areas within the geographical area occupied by the species [that are] essential to the conservation of the species," §1532(5)(A)(i), but also "specific areas outside the geographical area occupied by the species at the time it is listed [as a protected species] . . . [that are] essential to the conservation of the species," §1532A(5)(ii), there may be some agency modifications of critical habitat which do *not* injure a population of wildlife. See Brief for Petitioners 41, and n. 27. This is dubious to begin with. A principal way to injure wildlife under the Secretary's own regulation is to "significantly impai[r] . . . breeding," 50 CFR §17.3 (1994). To prevent the natural increase of a species by adverse modification of habitat suitable for expansion assuredly impairs breeding. But even if true, the argument only narrows the scope of the superfluity, leaving as so many wasted words the §1532(a)(5)(i) definition of critical habitat to include currently *occupied* habitat essential to the species' conservation. If the Secretary's definition of "harm" under §1538(a)(1)(B) is to be upheld, we must believe that Congress enacted §1536(a)(2) solely because in its absence federal agencies would be able to modify habitat in currently *unoccupied* areas. It is more rational to believe that the Secretary's expansion of §1538(a)(1)(B) carves out the heart of one of the central provisions of the Act.

II

The Court makes four other arguments. First, "the broad purpose of the [Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." *Ante*, at 10. I thought we had renounced the vice of "simplistically . . . assum[ing] that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* (emphasis in original). Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.[3]

Second, the Court maintains that the legislative history of the 1973 Act supports the Secretary's definition. See *ante*, at 16–18. Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this, but see *Chicago* v. *Environmental Defense Fund*, 511 U. S. ___, ___ (1994) (slip op., at 9–10); here it shows quite the

[3] This portion of the Court's opinion, see *ante*, at 11, n. 12, discusses and quotes a footnote in *TVA* v. *Hill*, 437 U. S. 153, 184–185, n. 30 (1978), in which we described the then-current version of the Secretary's regulation, and said that the habitat modification undertaken by the federal agency in the case would have violated the regulation. Even if we had said that the Secretary's regulation was *authorized* by §1538, that would have been utter dictum, for the only provision at issue was §1536. See 437 U. S., at 193. But in fact we simply opined on the effect of the regulation while assuming its validity, just as courts always do with provisions of law whose validity is not at issue.

opposite of what the Court says. I shall not pause to discuss the Court's reliance on such statements in the Committee Reports as "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'" S. Rep. No. 93–307, p. 7 (1973) (quoted *ante*, at 17). This sort of empty flourish—to the effect that "this statute means what it means all the way"—counts for little even when enacted into the law itself. See *Reves* v. *Ernst & Young*, 507 U. S. ___, ___ (1993) (slip op., at 13–14).

Much of the Court's discussion of legislative history is devoted to two items: first, the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take," with the observation that (along with other amendments) it would "help to achieve the purposes of the bill"; second, the relevant Committee's removal from the definition of a provision stating that "take" includes "the destruction, modification or curtailment of [the] habitat or range" of fish and wildlife. See *ante*, at 17–18. The Court inflates the first and belittles the second, even though the second is on its face far more pertinent. But this elaborate inference from various pre-enactment actions and inactions is quite unnecessary, since we have *direct* evidence of what those who brought the legislation to the floor thought it meant—evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote. See *ante*, at 18–19, n. 19.

Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of §1534, while §1538 solved a different problem altogether—the problem of takings. Senator Tunney stated:

"*Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*

"Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes.* The provisions of [the bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species. . . ." 119 Cong. Rec. 25669 (1973) (emphasis added).

The House floor manager, Representative Sullivan, put the same thought in this way:

"[T]he principal threat to animals stems from destruction of their habitat. . . . *[The bill] will meet this problem by providing funds for acquisition of critical habitat.* . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves.* Another hazard to endangered species arises from those who would *capture or kill them for pleasure or profit.* There is no way that Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so." *Id.*, at 30162 (emphasis added).

Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act. The Court really has no explanation for these statements. All it can say is that "[n]either statement even suggested that [the habitat acquisition funding provision in §1534] would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [§1538]." *Ante*, at 18–19, n. 19. That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." The Court points out triumphantly that they do not display the understanding (3) that the land acquisition program is "the [Act's] only response to habitat modification." *Ibid.* Of course not, since that is not so (all *public* lands are subject to habitat-modification restrictions); but (1) and (2) are quite enough to exclude the Court's interpretation. They identify the land acquisition program as the Act's only response to habitat modification *by private landowners*, and thus do not in the least "contradic[t]," *ibid.*, the fact that §1536 prohibits habitat modification *by federal agencies*.

Third, the Court seeks support from a provision which was added to the Act in 1982, the year after the Secretary promulgated the current regulation. The provision states:

> "[T]he Secretary may permit, under such terms and conditions as he shall prescribe—
>
> . . . . .
>
> "any taking otherwise prohibited by section 1538(a)(1)(B) . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U. S. C. §1539(a)(1)(B).

This provision does not, of course, implicate our doctrine that reenactment of a statutory provision ratifies an extant judicial or administrative interpretation, for neither the taking prohibition in §1538(a)(1)(B) nor the definition in §1532(19) was reenacted. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. ___, ___ (1994) (slip op., at 21). The Court claims, however, that the provision "strongly suggests that Congress understood [§1538(a)(1)(B)] to prohibit indirect as well as deliberate takings." *Ante*, at 12. That would be a valid inference if habitat modification were the only substantial "otherwise lawful activity" that might incidentally and nonpurposefully cause a prohibited "taking." Of course it is not. This provision applies to the many otherwise lawful takings that incidentally take a protected species—as when fishing for unprotected salmon also takes an endangered species of salmon, see *Pacific Northwest Generating Cooperative* v. *Brown*, 38 F. 3d 1058, 1067 (CA9 1994). Congress has referred to such "incidental takings" in other statutes as well—for example, a statute referring to "the incidental taking of . . . sea turtles in the course of . . . harvesting [shrimp]" and to the "rate of incidental taking of sea turtles by United States vessels in the course of such harvesting," 103 Stat. 1038 §609(b)(2), note following 16 U. S. C. §1537 (1988 ed., Supp. V); and a statute referring to "the incidental taking of marine mammals in the course of commercial fishing operations," 108 Stat. 546, §118(a). The Court shows

that it misunderstands the question when it says that "[n]o one could seriously request an 'incidental' take permit to avert . . . liability for direct, deliberate action *against a member of an endangered or threatened species.*" *Ante*, at 12–13 (emphasis added). That is not an *incidental* take at all.[4]

This is enough to show, in my view, that the 1982 permit provision does not support the regulation. I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary to permit environmental modification. See S. Rep. No. 97–418, p. 10 (1982); H. R. Conf. Rep. No. 97–835, pp. 30–32 (1982). But the *text* of the amendment cannot possibly bear that asserted meaning, when placed within the context of an Act that must be interpreted (as we have seen) not to prohibit private environmental modification. The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text. See *Chicago* v. *Environmental Defense Fund*, 511 U. S. ___ (1994). There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real-life expectations of a majority of the Members of Congress. If they read and relied on such tedious detail on such an obscure point (it was not, after all, presented as a revision of the statute's prohibitory scope, but as a discretionary-waiver provision) the Republic would be in grave peril.

Fourth and lastly, the Court seeks to avoid the evident shortcomings of the regulation on the ground that the respondents are challenging it on its face rather than as applied. See *ante*, at 11; see also *ante*, at 1 (O'CONNOR, J., concurring). The Court seems to say that *even if* the regulation dispenses with the foreseeability of harm that it acknowledges the statute to require, that does not matter because this is a facial challenge: so long as habitat modification that *would* foreseeably cause harm is prohibited by the statute, the regulation must be sustained. Presumably it would apply the same reasoning to all the other defects of the regulation: the regulation's failure to require injury to particular animals survives the present challenge, because at least *some* environmental modifications kill particular animals. This evisceration of the facial challenge is unprecedented. It is one thing to say that a facial challenge to a regulation that omits statutory element x must be rejected if there is any set of facts on which the statute *does not require* x. It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element x *happens to be present*. On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires. In other words, to simplify its task the Court today confuses lawful application of the challenged regulation with lawful application of a *different* regulation, *i.e.*, one requiring the various elements of liability that this regulation omits.

III

In response to the points made in this dissent, the Court's opinion stresses two points, neither of which is supported by the regulation, and so cannot validly be used to uphold it. First, the Court and the concurrence suggest that the regulation should be read to contain a requirement of proximate causation or foreseeability, principally *because the statute does*—and "[n]othing in the regulation purports to weaken those requirements [of the statute]." See *ante*, at 8, n. 9; 11–12, n. 13; see also *ante*, at 4–6 (O'CONNOR, J., concurring). I quite agree that the statute contains such a limitation, because the verbs of purpose in §1538(a)(1)(B) denote action directed at animals. *But the Court has rejected that reading.* The critical premise on which it has upheld the regulation is that, despite the weight of the other words in §1538(a)(1)(B), "the statutory term 'harm' encompasses indirect as well as direct injuries," *ante*, at 9. See also *ante*, at 9–10, n. 11 (describing "the sense of indirect causation that 'harm' adds to the statute"); *ante*, at 14 (stating that the Secretary permissibly interprets "'harm'" to include "indirectly injuring endangered animals"). Consequently, unless there is some strange category of causation that is indirect and yet also proximate, the Court has already rejected its own basis for finding a proximate-cause limitation in the regulation. In fact "proximate" causation simply *means* "direct" causation. See, *e.g.*, Black's Law Dictionary 1103 (5th ed. 1979) (defining "[p]roximate" as "Immediate; nearest; *direct*") (emphasis added); Webster's New International Dictionary of the English Language 1995 (2d ed. 1949) ("proximate cause. A cause which *directly*, or with no mediate agency, produces an effect") (emphasis added).

The only other reason given for finding a proximate-cause limitation in the regulation is that "by use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation." *Ante*, at 5 (O'CONNOR, J., concurring); see also *ante*, at 11–12, n. 13 (majority opinion). *Non sequitur*, of course. That the injury must be "actual" as opposed to "potential" simply says nothing at all about the length or foreseeability of the causal chain between the habitat modification and the "actual" injury. It is thus true and irrelevant that "the Secretary did not need to include 'actually' to connote 'but for' causation," *ante*, at 11–12, n. 13; "actually" defines the requisite *injury*, not the requisite *causality*.

The regulation says (it is worth repeating) that "harm" means (1) an act which (2) actually kills or injures wildlife. If that does not dispense with a proximate-cause requirement, I do not know what language would. And changing the regulation by judicial invention, even to achieve compliance with the statute, is not permissible. Perhaps the agency itself would prefer to achieve compliance in some other fashion. We defer to reason-

[4] The statutory requirement of a "conservation plan" is as consistent with this construction as with the Court's. See *ante*, at 12, and n. 14. The commercial fisherman who is in danger of incidentally sweeping up protected fish in his nets can quite reasonably be required to "minimize and mitigate" the "impact" of his activity. 16 U. S. C. §1539(a)(2)(A).

able agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. See *Chevron*, 467 U. S., at 843–845. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, see *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.

The second point the Court stresses in its response seems to me a belated mending of its hold. It apparently *concedes* that the statute requires injury *to particular animals* rather than merely to populations of animals. See *ante*, at 11–12, n. 13; *id.*, at 7, 9 (referring to killing or injuring "*members* of [listed] species" (emphasis added)). The Court then rejects my contention that the regulation ignores this requirement, since, it says, "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'" *Id.*, at 11–12, n. 13. As I have pointed out, see *supra*, at 3, this reading is incompatible with the regulation's specification of impairment of "breeding" as one of the *modes* of "kill[ing] or injur[ing] wildlife."[5]

But since the Court is reading the regulation and the statute incorrectly in other respects, it may as well introduce this novelty as well—law à la carte. As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a "taking," but only if it results in the killing or harming of *individual animals*, and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the *breeding*, of butterflies, would not violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act—not for the utterly unsupported reason that habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a "take."

* * *

The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species. There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. For these reasons, I respectfully dissent.

EDWIN S. KNEEDLER, Deputy Solicitor General (DREW S. DAYS III, Sol. Gen., LOIS J. SCHIFFER, Asst. Atty. Gen., BETH S. BRINKMANN, Asst. to Sol. Gen., and MARTIN W. MATZEN, ELLEN J. DURKEE, and JEAN E. WILLIAMS, Dept. of Justice attys., on the briefs) for petitioners; JOHN A. MACLEOD, Washington, D.C. (STEVEN P. QUARLES, CLIFTON S. ELGARTEN, THOMAS R. LUNDQUIST, CROWELL & MORING, and WILLIAM R. MURRAY, on the briefs) for respondents.

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[5] JUSTICE O'CONNOR supposes that an "impairment of breeding" intrinsically injures an animal because "[t]o make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete." *Ante*, at 2 (concurring opinion). This imaginative construction does achieve the result of extending "impairment of breeding" to individual animals; but only at the expense of also expanding "injury" to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual animal from impairment of that "essential function" is not the failure of issue (which harms only the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes *that* psychic harm, then why not the psychic harm of not being able to frolic about—so that the draining of a pond used for an endangered animal's recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that "injury" in the regulation includes injury to populations of animals. Even more so with the concurrence's alternative explanation: that "impairment of breeding" refers to nothing more than concrete injuries inflicted by the habitat modification on the animal who does the breeding, such as "physical complications [suffered] during gestation," *ante*, at 3. Quite obviously, if "impairment of breeding" meant such physical harm to an individual animal, it would not have had to be mentioned.

The concurrence entangles itself in a dilemma while attempting to explain the Secretary's commentary to the harm regulation, which stated that "harm" is not limited to "direct physical injury to an individual member of the wildlife species," 46 Fed. Reg. 54748 (1981). The concurrence denies that this means that the regulation does not require injury to particular animals, because "one could just as easily emphasize the word 'direct' in this sentence as the word 'individual.'" *Ante*, at 3. One could; but if the concurrence does, it thereby refutes its separate attempt to exclude indirect causation from the regulation's coverage, see *ante*, at 4–6. The regulation, after emerging from the concurrence's analysis, has acquired *both* a proximate-cause limitation *and* a particular-animals limitation—precisely the one meaning that the Secretary's quoted declaration will not allow, whichever part of it is emphasized.